87-2002

No. ———

Supreme Court, U.S.
FILED
JUN 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

———o———

RIGHT TO LIFE ADVOCATES, INC., ETC., ET AL.,
Petitioners,

vs.

AARON WOMEN'S CLINIC,
Respondent.

———o———

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

———o———

PETITION FOR A WRIT OF CERTIORARI

———o———

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55pp

QUESTIONS PRESENTED

1. Whether, on appeal from a Judgment enjoining permanently Petitioners from entering or trespassing onto certain privately-owned property in order to conduct any picketing, counseling or demonstrating, to physically confront, intimidate or harass certain people and to distribute or broadcast any information in oral or written form, the Court of Appeals, in a divided decision, deprived Petitioners of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, when it, in effect, excluded them from the protection of the unclean hands defense under Texas law, where Petitioners maintained that Respondent's (Plaintiff's) abortion activities were unlawful

- because aborting minors without appropriate legal consent under the *Texas Family Code,*
- because aborting females in violation of the Texas anti-abortion law which this Court purported to hold unconstitutional in *Roe v. Wade,* 410 U.S. 113 (1973) (constituting a collateral attack on *Roe* on constitutional and jurisdictional grounds) and
- because aborting females in violation of Texas anti-abortion law of U.S. Constitutional status which was revived as law in Texas as a legal effect of *Roe* (assuming *Roe* to be a lawful decision).

2. Whether, in the context of Question 1, above, the Court of Appeals deprived Petitioners of liberty and property without due process of law, in violation of the Due Process Clause of said 14th Amendment, when, on Petitioners' motion for rehearing in that Court, one of the Justices (Bill Cannon) of the 2-Justice majority with-

drew his approval of the majority opinion and concurred in the result only, thereby resulting in a 2:1 Judgment of affirmance but no majority in determination of Petitioners' unclean hands defensive rights (Justice Ross A. Sears standing alone on the exclusion of such rights; Justice Paul Pressler dissenting; and Justice Bill Cannon withdrawing his approval of the former majority opinion and concurring in result only).

3. Whether the Supreme Court of Texas deprived Petitioners of liberty and property without due process of law, in violation of the 14th Amendment to the U.S. Constitution, when it denied Petitioners' Application for a Writ of Error in the context of this lawsuit, including the three-way, nonguidance reported opinions of the Court of appeals.

4. Whether *Roe v. Wade,* 410 U.S. 113 (1973), should be overruled as violative of the U.S. Constitution.

5. Whether this Court should reconsider and overrule *Roe* in light of:

- the existence of important consequences of *Roe* which were unintended by the Court; and
- the existence of important factual errors or omissions in *Roe.*

LIST OF ALL PARTIES

A. PETITIONERS:

1. RIGHT TO LIFE ADVOCATES, INC. "d/b/a ABORTION ABUSE ADVICE & INFORMATION SERVICE, ABORTION ABUSE & ADVISORY INFORMATION HOTLINE, and CRISIS PREGNANCY CENTER OF HOUSTON";
2. CRAIG K. ANDERSEN;
3. J. (JIM) BAILEY;
4. LEE P. HELMKE;
5. GARY LOTH;
6. BARBARA A. MARTONE;
7. JOHN A. MARTONE;
8. KATHY MATHEMS;
9. SHEILA MCINTOSH; and
10. JOSEPH J. PESL.

B. RESPONDENT:

1. AARON WOMEN'S CLINIC (which is an assumed name of ORIENT SALES CORPORATION, a corporation).

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The Opinion of the Court of Appeals (Pet. App. 1-21, 23-24), which consists of the Opinion of Justice Ross A. Sears, the Dissenting Opinion of Justice Paul Pressler and the Concurring Opinion on motion for rehearing of Justice Bill Cannon, is reported at 737 S.W. 2d 564-573. The Opinion of the District Court (Pet. App. 28-39) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was dated and entered on May 21, 1987 (Pet. App. 22-23). A timely Motion for Rehearing was denied by that Court on September 10, 1987, during which Justice Cannon withdrew his approval of the majority opinion and concurred in the result only (Pet. App. 23-26). The Supreme Court of Texas denied Petitioners' timely Application for a Writ of Error on February 10, 1988,[1] and overruled Petitioners' timely Motion for Rehearing on March 16, 1988 (Pet. App. 26-27). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION:

> *Article III:*
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; * * *.

---

[1] This action meant that the Supreme Court was "not satisfied that the opinion of the court of appeals in all respects ha[d] correctly declared the law," but that it was of the opinion that "the application present[ed] no error of law which require[d] reversal or which [was] of such importance to the jurisprudence of the State as to require correction * * *." Rule 133(a), *Tex. Rules of Appellate Procedure*.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article VI, Second Paragraph:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5th Amendment:

* * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

14th Amendment:

Section 1. All persons born or natrualized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

———o———

STATEMENT OF THE CASE

Respondent is a women's clinic for birth control services, pregnancy testing and pregnancy terminations, and is located in Houston, Texas. In July, 1985, Respondent sued Petitioners for injunctive relief and damages in the District Court for the 125th Judicial District, Harris County, Texas, for alleged trespass, libel, slander, etc. arising out of literature distribution and speech activities concerning abortion or Respondent's abortion activities. The complained of activities, which occurred on Saturdays between May and July 1985, were undertaken on privately owned property—primarily outside sidewalks and a paved surface parking area—adjacent to a 5-story office building at 6420 Hillcroft, Houston, Texas. At that time, Respondent was the largest of about thirty tenants in such building.

Petitioners raised a number of defenses, including that Respondent had unclean hands and, hence, was not entitled to injunctive relief. A hearing was conducted on Respondent's request for a temporary injunction. Subsequently, the District Court ruled, by Memorandum of Opinion, that Respondent was entitled to a temporary injunction (Pet. App. 28-39). It ruled against Petitioners' unclean hands and other defenses.

Shortly thereafter, the lawsuit was severed by agreement into two causes, one for injunctive relief and one for damages. Counsel for the parties stipulated that the evidence presented at said hearing would be used at the trial for (permanent) injunctive relief, and the injunction causes proceeded to trial on such evidence plus some additional evidence and argument. [Nothing was said of evidence taken at such hearing under Defendants' (Petitioners') Bills of Exceptions.] Thereafter, the Court rendered Judg-

ment for a permanent injunction against Petitioners which provided, in pertinent part (Tr. 62):

> ORDERED, ADJUDGED, and DECREED that the Defendants * * *, their servants, agents, and others acting in concert or participation with the Defendants be, and they are hereby enjoined and commanded to desist and refrain from entering or trespassing onto any portion of the private property of Plaintiff located at 6420 Hillcroft, Houston, Harris County, Texas, specifically including, but not limited to, the private parking lot of the office building at 6420 Hillcroft, the three doorways to the office building at 6420 Hillcroft, and the interior of the office building at 6420 Hillcroft, in order (1) to conduct any demonstrating, picketing, or counseling; (2) to physically confront, intimidate, or harass any customer, potential customer, employee, invitee, or tenant of the office building at 6420 Hillcroft; or, (3) to distribute or broadcast any information, in written or oral form, specifically including, but not limited to, pamphlets and leaflets.*
>
> *The area specifically prohibiting defendants from entry is shown on Exhibit "A," attached hereto.

A permanent injunction to such effect was issued against Petitioner Right To Life Advocates, Inc., and, by agreement of counsel, the injunction operated to cover the remaining Petitioners.

On appeal, the Court of Appeals affirmed, one Justice (Paul Pressler) dissenting (Pet. App. 1-21). On Petitioners' motion for rehearing, however, Justice Bill Cannon wrote a 2-sentence Concurring Opinion in which he withdrew his approval of the majority opinion and concurred in the result only (Pet. App. 23-24).

The Supreme Court of Texas denied Petitioners' Application for a Writ of Error and overruled later their Motion for Rehearing. The effect of such action was to allow the decision of the Court of Appeals to stand.

The pertinent facts are these:

1. On Saturdays between May 17, 1985, and July 20, 1985, Petitioners engaged in picketing, distribution of literature and sidewalk counseling activities at 6420 Hillcroft. The picketing took place primarily on a public sidewalk along Hillcroft in the vicinity of the building. Petitioners Andersen, Loth and Pesl engaged exclusively in picketing activities on such public sidewalk (S.F. 335-336, 387-388, 391, 392-393). Other Petitioners engaged in counseling and distribution of literature primarily on the parking lots, building sidewalks and near an entrance of the building. Petitioner Mathems entered the building "as far as four or five steps if [she] was still talking to someone that was a potential customer of the clinic, and they were still listening to [her]" (S.F. 415). The counseling and literature (which were free of charge) involved abortion, complications of abortion, alternatives to abortion, etc. Some women were dissuaded from entering the building after receiving counseling or literature from some Petitioners.

The Petitioners who were on such premises did not prevent vehicles from parking or make it difficult for them to park, nor did they block any entrance or exit of the building. They conducted themselves in a peaceful and orderly manner. Most of the customers who came to Respondent's place of business on Saturdays did so by motor vehicles which were parked on one of the parking areas near the building.

2. Respondent had ten advertisements in the 1985 edition of the Southwestern Bell Yellow Pages, Greater Houston Consumer Directory, including two half-page ones. One such half-page advertisement related, in part,

"TEENAGERS
WELCOME"

while the other one said, in part, "EMOTIONALLY MATURE MINORS ACCEPTED" (Def. Ex. 2).

3. About 50 abortions were performed at Respondent's place of business over the last couple of years (between 1983 and 1985) on minors without parental consent; that "on a particular day with a particular physician" an unmarried 17 year old could get an abortion there without consent from a parent, relative or judge; and that, while some physicians would not perform abortions without such consent, others would (S.F. 141-142 on Def. Bill of Exceptions).

4. The federal questions presented in this Petition were raised in the lower court(s): Through their unclean hands defense, Petitioners challenged Respondent's abortion activities as violative of certain Texas statutory law, i.e., as violative of the Texas anti-abortion law which this Court purported to hold unconstitutional in *Roe v. Wade,* 410 U.S. 113 (1973), with such law still being in effect because *Roe* itself is void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction, as violative of certain Texas anti-abortion law of U.S. Constitutional status revived as a legal effect of *Roe* (assuming *Roe* to be a lawful and constitutional decision), and as violative of Section 35.03(a)(4) of the *Texas Family Code* as a result of aborting minor females without appropriate parental or other consent (Tr. 43-44, 55; S.F. 134-141, 485-490, 522-525; see Supp. Tr. 6-7) (Pet. App. 36-39). These challenges were pressed before the Court of Appeals (on appeal and on motion for rehearing) and the Supreme Court of Texas (on application for a writ of error and on motion for rehearing).

Petitioners challenged the exclusion of such defenses by the Court of Appeals in their motion for rehearing before that Court and in their application for a writ of error and motion for rehearing before the Supreme Court of Texas. This challenge was based, in part, upon the deprivation by the Court of Appeals of liberty and property of Petitioners without due process of law, in violation of the 14th Amendment to the U.S. Constitution.

Petitioners challenged the denial of their application for a writ of error by the Supreme Court of Texas in their motion for rehearing before that Court. This challenge was based, in part, upon that Court's deprivation of liberty and property of Petitioners without due process of law in violation of said 14th Amendment. The unconstitutional overbreadth challenge to the District Court's Judgment and Writ of injunction under Article I, Section 8, of the Texas Constitution was pressed before the Court of Appeals and Supreme Court of Texas, including in the motions for rehearing.

———o———

ARGUMENT

I.

THE COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION WHEN IT, IN EFFECT, EXCLUDED PETITIONERS' DEFENSES OF UNCLEAN HANDS UNDER EXISTING TEXAS APPELLATE LAW

The Court of Appeals deprived Petitioners of liberty and property without due process of law when it, in effect, excluded them from the protection and benefit of the defense of unclean hands as developed by certain Texas appellate law—that one who is engaged in unlawful conduct

or business is not entitled to equitable relief in order to preserve or aid the same.[2] See U.S. Const., 14 Amend., Due Process Clause; *Shelly v. Kraemer*, 334 U.S. 1, 14-18 (1948). The Court brushed aside such law with the statement that its examination of the cases at issue (footnote 2 herein) "reveals no clear deviation from the requirement of injury to the complaining party" (Pet. App. 16).

While the courts in such cases did not *state* that they were making exceptions to the requirement of injury, they *did so* by their holdings and/or language and made it clear that one who, like Respondent here, is engaged in an unlawful business or unlawful or wrongful conduct is not entitled to equitable relief to preserve or aid such business or conduct.[3] This appellate law had clear application to

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[2] *City of Wink v. Griffith Amusement Co.*, 100 S.W. 2d 695, 702 (S.C. Tex., 1936); *Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225, 229-230 (S.C. Tex., 1927); *Riley v. Davidson*, 196 S.W. 2d 557, 559, 560 (Tex. Civ. App.—Galveston, 1946), writ ref. n.r.e.; see *Sanders v. Cauley*, 113 S.W. 560, 562 (Tex. Civ. App., 1908), no writ.

[3] In *City of Wink, supra*, 100 S.W. 695, the Supreme Court of Texas ruled, in part, that an amusement company which was conducting prize drawings was not entitled to an injunction prohibiting the City of Wink from enforcing an anti-lottery ordinance because its business violated the public policy of Texas and, hence, it did not come into court with clean hands.

In *Humphreys-Mexia Co., supra*, 297 S.W. 225, the Supreme Court of Texas ruled, in part, that an oil company which had permission from the state board of water engineers to impound water from the Navasota River, which was an intermittant river at the location in question, but which, in doing so, made use of a water company's river bed and banks without permission was not entitled to enjoin the water company from appropriating water from the pool since it was engaged in a trespass and a wrong and the effect of the injunction "would have been to aid it in the continuance of a legal wrong and trespass." The oil company did not come into court with clean hands in spite of the fact that the water company was not injured by the impounding conduct and, in fact, was benefiting therefrom by appropriating water from the pool.

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the instant situation since Respondent's abortion business was (and still is) unlawful and Respondent was seeking to preserve or aid it through the injunction aspect of the lawsuit. Accordingly, Petitioners had a right to press the defense of unclean hands under such appellate law, and the Court of Appeals violated the due process clause of the 14th Amendment to the U.S. Constitution when it refused to give effect to such right by considering such defense or ordering the District Court to do so.

Respondent's abortion business violated either (1) Texas anti-abortion statutory law which this Court, in *Roe v. Wade,* 410 U.S. 113 (1973), purported to hold unconstitutional, or (2) treaty-status Texas anti-abortion law which was revived as law in Texas as a legal effect of *Roe,* assuming, *arguendo, Roe* to be a lawful and constitutional decision. These subjects are discussed in detail below. In addition, and regardless of the two areas of illegality, above, Respondent's abortion business violated Section 35.03(a)(4) of the *Texas Family Code* since it included the abortion of unmarried minors without parental or other lawful consent thereto.

The unconstitutionality of the action of the Court of Appeals is heightened by the fact that Justice Cannon, on motion for rehearing in that Court, withdrew his approval of the majority opinion and concurred in result only, there-

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In *Riley, supra,* 196 S.W. 2d 557, the Court of Civil Appeals ruled that one who established a water supply line in violation of the health law was not entitled to enjoin one who had cut the line and removed pipe on two occasions because he did not have clean hands.

Finally, in *Sanders, supra,* 113 S.W. 560, the Court of Civil Appeals quoted with approval from a certain treatise on equity that " 'any really unconscientious conduct, connected to the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience' " (p. 562).

by causing the deprivation at issue to be only that of Justice Sears. See Statement of the Case, *supra,* p. 4. In other words, the exclusionary ruling at issue—which was very important to Petitioners' defensive posture—was supported only by one of the three Justices. Contrast, however, the majority rule requirement of *Tex. Government Code,* § 22.222(c). As a result, the deprivation of such rights was effected where the majority of the Court did not so rule.

II.

THE SUPREME COURT OF TEXAS VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION WHEN IT ALLOWED THE DECISION OF THE COURT OF APPEALS TO STAND

The Supreme Court of Texas deprived Petitioners of liberty and property without due process of law, in violation of the Due Process Clause of said 14th Amendment, when it allowed the decision of the Court of Appeals to stand through its denial of Petitioners' Application for a Writ of Error. Yet the reported decision of the Court of Appeals—which is 1:1:1 on rationale—has no precedential value whatsoever and, on the feature dealing with free expression on private property, presented what Petitioners believe was a case of first impression to the Supreme Court of Texas.

Moreover, the Court allowed an unconstitutionally overbroad judgment for a permanent injunction to stand, in violation of Article I, Section 8, of the Texas Constitution. It was overbroad because it prohibited entry or "trespassing" for *any* type of speech or press on *any* subject and covered three Petitioners (Andersen, Loth and Pesl) who did *not* enter on the premises for free expression purposes as well as unnamed directors, officers or representa-

tives of Right To Life Advocates, Inc. who were *not* shown to have had any connection whatsoever to such premises for such purposes. It operated even to foreclose the right of the then owner of the property at issue—The Prudential Insurance Company of America—from granting consent to Petitioners to enter upon such premises for free expression purposes.

Against this background, the Supreme Court of Texas, in effect, abdicated its responsibility to supervise the due administration of justice in Texas in relation to this lawsuit and the highly significant issues presented therein, and, by so doing, deprived Appellants of liberty and property without due process of law in violation of said 14th Amendment. The Court's action was a manifest abuse of discretion and shirking of duty, and operated to exclude Petitioners from the protective reach of the Court under the Texas Constitution and laws.

III.

ROE V. WADE SHOULD BE OVERRULED AS VIOLATIVE OF THE U.S. CONSTITUTION

A. *Background.* One application of Petitioners' unclean hands defense challenged collaterally *Roe v. Wade, supra,* 410 U.S. 113, on constitutional and jurisdictional grounds. As shown above, Petitioners' rights under the Due Process Clause of the 14th Amendment were violated by the exclusion of such defense under Texas appellate law. Had such defense been allowed, the lower courts would have faced (and considered presumably) such collateral attack. In so doing, Petitioners submit that Respondent would *not* have been entitled to injunctive relief to preserve or to aid its unlawful abortion conduct or business because of unclean hands. See *City of Wink, supra,* 100 S.W. 2d at 702; *Humphreys-Mexia Co., supra,* 297 S.W.

at 229-230; *Riley, supra,* 196 S.W. at 559, 560; 30 *C.J.S.,* "Equity," § 99, pp. 1057-1059.

Petitioners submit that this Court either should entertain and resolve the challenge to *Roe* or reverse the Judgment of the Court of Appeals and remand the case for consideration and resolution of same. Since *Roe* is of this Court's making, Petitioners submit that the Court should consider the merits of the challenge and overrule *Roe.* This challenge is presented briefly below.

B. *Roe Is Unconstitutional.* At the threshold, it is well established that if a court in the United States violates the U.S. Constitution in a proceeding before it, *it loses jurisdiction to proceed to judgment,* and any "judgment" which it might enter would be *void.* See *Johnson v. Zerbst,* 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh,* 93 U.S. 274, 277-284 (1876). This Court is capable of violating the U.S. Constitution. See *Erie R. Co. v. Tompkins,* 304 U.S. 64, 77-78, 79-80 (1938), where the Court even *admitted* that it and lower federal courts had done so with application of the doctrine of *Swift v. Tyson,* 16 Pet. 1 (1842). Compare *Plessy v. Ferguson,* 167 U.S. 537 (1896), with *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).

Roe is void on the following constitutional or jurisdictional bases:

1. *No Representation.* Neither Abortion "Survivor" Children nor Unborn Children threatened and endangered by abortion were represented before the U.S. District Court or this Court in *Roe.* Abortion "Survivor" Children born in this country are U.S. Citizens (with extremely minor exceptions), yet they are doomed to die and die primarily due to prematurity, abortional injury or lack of care. Unborn Children, with well recognized legal postures under the laws of the United States, Texas and

other States, are killed outright by abortion. Abortion "Survivors" and Unborn Children are persons or entities with legal personalities under the Due Process Clause of the 5th Amendment to the U.S. Constitution. The Judgments of the U.S. District Court and this Court in *Roe*, rendered without any representation of such Victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivations of life, liberty and property without due process of law, in violation of such 5th Amendment. Accordingly, such Judgments are unconstitutional and void as to them. See U.S. Const., 5th Amendment (Citizenship and Due Process Clauses); *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885) (Unborn Children); *Pennoyer v. Neff*, 95 U.S. 714, 733-734 (1878) (U.S. Citizens); Rule 19, *F.R. Civ. Proc.*

2. *No Personal Jurisdiction.* Neither the U.S. District Court nor this Court had personal jurisdiction over such Abortion "Survivor" Children or Unborn Children in *Roe*. Yet such Children were affected vitally by those proceedings, and had a right to be before the Courts through next friends or guardians (or by counsel for such guardians or next friends). The Judgments of such Courts, therefore, were unconstitutional and void as to them. *Ibid.*

Moreover, this deficiency operated to divest the U.S. District Court and this Court of authority to pronounce judgment affecting them personally. Neither the Unborn Children who were conceived and killed by abortion after *Roe* nor the Abortion "Survivor" Children after *Roe* could be affected jurisdictionally by *Roe* in their rights posture, yet they die from *Roe*. See *McArthur v. Scott, supra*, 113 U.S. at 391-392, 404; *Pennoyer v. Neff, supra*, 95 U.S. at 733-734. The Judgments of such Courts, rendered without personal jurisdiction over such Infant Victims, are

void as violative of fundamental principles of personal jurisdiction.

3. *Invidious Discriminations.* The discriminations perpetrated in *Roe* against Abortion "Survivors" and Unborn Children as compared to the nonaborted born and corporations are invidious and deprive such Children of life, liberty and property without due process of law, in violation of the 5th Amendment to the U.S. Constitution. For example, corporations, which are artificial beings and not mentioned in the U.S. Constitution, are "persons" under the Due Process Clause of such 5th Amendment and under the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution, while actual unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are denied such personhood. A prematurely born child of 7-month gestational age has 14th Amendment personhood while an older and more developed Unborn Child of 8-months gestational age does not. Such crazy quilt discriminations are violative patently of due process.

4. *Failure To Apply Pre-Existing Supreme Court Decisions Concerning Human Personhood Under the 14th Amendment.* The Court failed to apply the "live," "human" and "having a being" test of 14th Amendment personhood postulated by it in *Levy v. Louisiana,* 391 U.S. 68 (1968), and the "biological" test of such personhood set forth in *Glona v. American Guarantee and Liab. Ins. Co.,* 391 U.S. 73 (1968), to the affected Unborn Children. If such constitutional interpretive decisions can be overlooked or disregarded, how can it be maintained that a constitutional interpretive decision has "law of the land" ranking? See U.S. Const., Art. VI (Supremacy Clause).

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate at birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the self-same person before birth, only at a different developmental stage. The human genetic code is present at fertilization. The implied rights cases of constitutional stature [e.g., *Griswold v. Connecticut,* 381 U.S. 479 (1965)] were misapplied on the issue of personhood.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment.* While "liberty" is a broad concept, "life" is the most basic of rights for, without it, all other rights and interests are meaningless. Where was the correlation between "liberty" and the right to destroy unborn life? Or the basis for the "fundamental" ranking of such right? Not only was abortion a crime at common law and in Texas, but the legal and social heritage of this Nation viewed abortion not as a "right" but as a naked wrong. Moreover, the Constitution protects the life rights of persons against certain governmental deprivations, and *nowhere* does it give any human being the right to destroy the life of another. If the implied rights decisions of this Court were applied propertly, the life right of the Unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivations of Rights.* The Due Process Clause of the 5th Amendment stood as a bar to this Court's Judgment in *Roe* which endangered the rights of Abortion "Survivors" and authorized the destruction of a large body of legally cognizable rights of the Unborn. See

Marbury v. Madison, 5 U.S. 137, 163 (1803); *Munn v. Illinois*, 94 U.S. 113, 130 (O.T., 1886).

In Texas, an Abortion "Survivor" would be a U.S. and Texas Citizen (with extremely minor exceptions) per the Citizenship Clause of the 14th Amendment, U.S. Const., and entitled to citizen protections under Article I, Section 19, of the Texas Constitution; a "person" within the protective reach of the Due Process and Equal Protection Clauses of such Amendment; a "person" within the "open courts" provision of Article I, Section 13, of the Texas Constitution; an "individual" within the protection of the *Texas Penal Code* [See *Tex. Penal Code*, § 1.07(17).]; a "child" under the *Texas Family Code*, § 11.01(1), and the tort law of Texas; and would have the same rights, powers and privileges of a child born in Texas after the normal gestation period (*Tex. Family Code*, § 12.05).[4]

Similarly, Unborn Children are recognized legally and have substantial legal rights in Texas, etc. Since rights cannot and do not exist *in vacuo*, legal statuses stem therefrom.[5] E.g., an Unborn Child is recognized under the pre-

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[4] This Court appeared to be unaware that Children might survive abortions. Yet Children are born alive after abortions. See, e.g., *Showery v. State*, 690 S.W. 2d 689, 694, 695-696 (Tex. App.—El Paso, 1985) pet. dis. rev. ref. (Tex. Crim. App.). They exist in the most *monstrously hostile* environment imaginable for a defenseless child—where the "mother" abandons her child, where the abortionist is paid (in most cases) to deliver a dead baby, and where the attendants are employees of the abortionist or the abortion facility.

[5] Under English law, the legal status and rights posture of an Unborn Child was recognized by a substantial body of law, statutory and case. E.g., 12 Ch. II, c. 24, §§ VIII and IX (1660) (representation by a testamentary guardian, with authority to sue to protect the interests of the Unborn Child); *Reeve v. Long*, 83 E. Repts. 754 (House of Lords, 1695) (vesting of a remainder interest in real property), as codified in 10 & 11 Wm. III, c. 16 (1699); *Lutterel's Case* (c. 1660), referred to in *Hale v. Hale*, 24 E. Repts.

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natal tort injury doctrine [*Yandell v. Delgado*, 471 S.W. 2d 569 (S.C. Tex., 1971)]; is entitled to receive a monetary award for the wrongful death of his father [*Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App.—Eastland, 1931), no writ]; is entitled to be represented in judicial proceedings which affect him or her [*McArthur v. Scott, supra*, 113 U.S. at 391-392, 404 (involving Unborn Children not even in gestation)]; is entitled to have his or her mother undergo a life-saving blood transfusion (*Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537, 538 (S.C.N.J., 1964), *cert. denied*, 337 U.S. 985), or a needed caesarean operation [*Jefferson v. Griffin Spalding Co. Hosp. Authority*, 274 S.E. 2d 457, 459, 460 (S.C. Ga., 1981)]; is entitled to insurance benefits under the Social Security Act, Subchapter II, 42 U.S.C. 401 *et seq.* [*Adams v. Weinberger*, 521 F. 2d 656, 660-661 (C.A. 2, 1975)], or ADC benefits under Subchapter IV of the Social Security Act, 42 U.S.C. 601 *et seq.* [*In the Matter of Diane Catoe v. Lavine*, 378 N.Y.S. 2d 623, 626 (App. Div., 2nd Dept., N.Y., 1976), *motion for leave to appeal*

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25, 26 (Ch., 1692) (representation in judicial proceeding and award of an injunction to stay waste of property interests). The Unborn Child was considered a "Person in rerum Natura" [*Wallis v. Hodson*, 27 E. Repts. 642, 643-644 (Ch., 1740)]; was "in esse, according to the rule of the civil law" [*Millar v. Turner*, 27 E. Repts. 907, 908 (Ch., 1747-1748); had "an existence in the eye of the law" [*Burdet v. Hopegood*, 24 E. Repts. 484 (Ch., 1718)]; and was "living * * * in ventre sa mere" [*Beale v. Beale*, 24 E. Repts. 373 (Ch., 1713)].

On the criminal side, abortion of a live Unborn Child was an offense at common law [e.g., I Blackstone, *Commentaries on the Laws of England* (c. 1765), p. 129; III Coke, *Institutes on the Lawes of England* (posth. c. 1644), p. 50; see III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801], and continued so into the laws of this country [e.g., I Swift, *A System of Laws of the State of Connecticut* (1795), pp. 176-178; *Mills v. The Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle*, 82 N.C. 566, and 83 N.C. 544 (S.C.N.C., 1880)].

denied, 386 N.Y.S. 2d 1027]; and is entitled to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* [*Tex. Employers' Ins. Co. v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969)]. A remainder interest in real property may vest in an Unborn Child [*Crisfield v. Storr*, 36 Md. 129, 146 (Ct. App. Md., 1872)]. So too with a beneficial interest under a trust [*Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga., 1927)].[6]

8. *Deprivations of Rights Without a Trial. Roe* was decided by the District Court by way of summary judgment. There was no trial. Henry Wade did not submit even an Affidavit for the affected Children. Yet there were substantial factual (as well as legal) matters which needed presentation under the traditional safeguards of a trial, such as the time when human life commences scientifically, the characteristics of such life as related to legal "personhood," viability, whether live births can result from abortion procedures and at what point(s), the needs of such "survivors," etc. In such a setting, the Due Process Clause of the 5th Amendment to the U.S. Constitution barred the subjection to destruction or endangerment of the rights of an *entire class* of human beings.

9. *Manufacture of the Right of Abortion, Etc.* In *Roe*, this Court violated Article III of the U.S. Constitution by creating a constitutional liberty of abortion and by restricting the states of *their* reserved constitutional authori-

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[6] Under Texas statutory law, a suit to terminate the parent/child relationship may be brought after the first trimester of pregnancy (*Tex. Family Code*, § 15.021), and the Unborn Child is to be represented therein, with exceptions not here pertinent [See *id.*, § 11.10(a).]. Further, Children who were unborn at the time of the death of their father or other relation may take, as posthumous children, under the intestate laws of Texas or under the will of their father. See *Tex. Probate Code*, §§ 41(a), 67(b).

ties to legislate in this area of substantial state interest. This violated also the unenumerated rights of the people, as guaranteed by the 9th Amendment to the U.S. Constitution, and the Division of Powers Concept, as guaranteed by the 10th Amendment to such Constitution. See *Erie R. Co. v. Tompkins, supra,* 304 U.S. at 77-78, 79-80. Finally, the Court violated the Supremacy Clause of Article VI by authorizing the destruction of rights cognizable under federal statutory law (e.g., insurance and ADC benefits under the Social Security Act, Subchapters II and IV, 42 U.S.C. 401 *et seq.*, and 42 U.S.C. 601 *et seq.*, respectively).

IV.

ROE V. WADE SHOULD BE RECONSIDERED AND OVERRULED FOR ADDITIONAL REASONS

The collateral attack on *Roe v. Wade, supra,* 410 U.S. 113, set forth in Section III of the Argument, above, looks to an overruling of *Roe* on constitutional and jurisdictional grounds. Reconsideration and overruling of *Roe* should be undertaken for additional reasons set forth below. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Dissenting Opinion of Justice Brandeis).

A. *Roe Has Produced Various Unintended Consequences. Roe* has produced consequences or results which this Court did not intend:

1. *Abortion on Demand.* In *Roe,* this Court made it clear that a pregnant woman does not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153). The Constitution does not require "abortion on demand" (410 U.S. 208, Burger, C.J., Concurring Opinion). In *Doe v. Bolton,* 410 U.S. 179 (1973), the Court said that "*Roe v. Wade, supra,* sets forth our conclusion

that a pregnant woman does not have an absolute constitutional right to an abortion on her demand" (410 U.S. at 189). The opposite, as the Court may well take note, has occurred and continues. Well over one million Unborn Children are killed by abortion in this Nation each year. Abortion "Survivor" Children, practically all of whom are U.S. Citizens, die also from abortion or its "ethic." Even where a state proscribes abortion after viability, with life and health exceptions per *Roe*, the "health" meaning under *Doe* is so broad as to make such proscription more form than substance.

2. *Effect of Abortion and the Abortion "Ethic" on Children Who "Survive" Abortion.* Abortions and applications of the abortion "ethic" bring about deaths of U.S. Citizen Children who continue to live *after* they have been aborted. These Children die primarily as a result of prematurity, abortional injury or lack of care. Sometimes they are killed outright. See, e.g., *Showery v. State, supra,* 690 S.W. 2d 689. Moreover, since "unsuccessful" abortions (i.e., those resulting in live births) could translate into legal claims against the abortionists, etc., "success" is encouraged legally—to the naked detriment of Infant U.S. Citizens. *Stills v. Gratton,* 127 Cal Reptr. 652, 657, 658-659 (Cal. App., 1st Dist., 1976); see *The Ladies Center of Clearwater Inc. v. Reno,* 341 So. 2d 543 (Fla. App. 2d, 1977).

3. *Internal Legal Chaos. Roe* has introduced legal chaos in Texas and other domestic U.S. Jurisdictions relative to Unborn Children. They have substantial legal recognitions and rights, yet they may be killed by abortion. Under Texas law, for example, an Unborn Child has legal rights of representation, protection against prenatal torts, and rights under property law. In a majority of U.S.

Jurisdictions, a *stillborn child* who had reached the viability stage (or earlier, as in Georgia and Rhode Island) is a "person," etc. under their respective wrongful death or kindred statutes. Certain property interests may vest in an Unborn Child [*Gay v. Baker,* 58 N.C. 344, 345, 346 (S.C. N.C., 1860) (trust); *Crisfield v. Storr, supra,* 36 Md. at 145-146 (remainder in real property)]. A "duty of care" is owed to the Unborn Child under the prenatal tort injury doctrine, as recognized in all 51 domestic U.S. Jurisdictions. How can the "law" recognize a legal status and provide for or recognize legal rights in an Unborn Child when *Roe* authorizes such Child to be destroyed by abortion on demand? Should the viability of legal rights in an unborn child be made to depend upon the whim or desire of the one who seeks to destroy the life of such child?

4. *Roe Operated To Revive Texas Anti-abortion Law of U.S. Constitutional Stature.* In *Roe,* the Court purported to hold unconstitutional the anti-abortion statutory law which "Texas first enacted • • • in 1854." *Roe, supra,* 113 U.S. at 119. The legal effect of such holding operated *to revive* the law on the subject *prior* to enactment of the "void" statute. See *People ex rel Farrington v. Mensching,* 79 N.E. 884, 889-890 (Ct. App. N.Y., 1907); *Harrison v. State,* 527 S.W. 2d 745, 748 (Crim. App. Tenn., 1975), *cert. denied,* see 527 S.W. 2d 745; *Goines v. Rockefeller,* 338 F. Supp. 1189, 1195 (S.D.W.Va., 1972); 16 *C.J.S.* "Constitutional Law," § 101, pp. 469, 473.

This law, so revived, was either an English anti-abortion statutory provision [9 Geo. IV, c. 31, § XIII (1828)], or the English Common Law offenses of abortion.[7] The Republic of Texas adopted such law (1) by

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[7] At Common Law if an abortion resulted in the death of the woman, regardless of the length of her pregnancy, the offense as

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its Constitution of 1836, when it adopted the English Common Law as the "rule of decision" for application "in all criminal cases" (Const. Rep. of Tex., 1836, Art. IV, § 13); and (2) by statute in 1836, which provided that "all offenses known to the common law of England," which were not provided for therein (and abortion was not so provided), were to be "punished in the same manner as known to said common law" (Act Punishing Crimes and Misdemeanors, § 54, approved December 21, 1836, 1 Gam., *The Laws of Texas,* 1247, 1255).[8]

The criminal law provisions formed part of the laws of the Republic which were carried forward into the law of the State of Texas by the 1845 Annexation Accord (Tex. Const. of 1845, Art. Thirteenth, § 3; see *id.,* § 13). See 5 *U.S. Stats. at Large* 797-798 and 9 *U.S. Stats at Large* 108. After Statehood, the Supreme Court of Texas declared

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to her was *murder* [*Margaret Tinkler's Case* (1781), I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), pp. 230, 354-356]; if it resulted in the birth of a live child who afterwards died as a result, the offense per most English authorities was *murder* [see, e.g., *Sim's Case,* 75 E. Repts. 1075 (Q.B., 1601)]; and if a live child was killed in the womb as a result of an abortion, with the child being alive in contemplation of law when it "was able to stir in the mother's womb," the offense as to the child was a "heinous misdemeanor," etc. [I and IV, Blackstone, *Commentaries on the Laws of England* (c. 1765; 1770), pp. 129-130, 198, respectively]. The first reported English case dealing with abortion is in the year 1200, during the reign of King John. See I *Select Pleas of the Crown AD 1200-1225* (Selden Society, 1887), Case No. 82 (assault during childbirth), p. 39. Abortion was a common law offense in various States *prior* to their enactment of specific anti-abortion statutory provisions. E.g., *Commonwealth v. Bangs,* 9 Mass. 386 (O.T., 1812); *Mills v. The Commonwealth, supra,* 13 Pa. St. 630, 632.

[8] In 1840, the Republic adopted the English Common Law (with exceptions) which, together with the statutes of the Republic, constituted the "rule of decision" in the Republic (Act to Adopt the Common Law of England, etc., approved January 20, 1840, 2 Gam., *The Laws of Texas,* p. 177).

that "[t]he common law in criminal cases, not provided for by legislative enactment, was introduced by the constitution of the republic, *and is still the law.*" *Grinder v. The State,* 2 Tex. 339, 340 (S.C. Tex., Dec. Term, 1847). (Emphasis added.)

Hence, the Texas anti-abortion law in existence *prior* to 1854 [9 Geo. IV, c. 31, § XIII (1828) and/or the English Common Law proscriptions concerning abortion] is of Article VI status by virtue of the 1845 Annexation Accord. This Accord is fully executed and cannot be changed. Only the Texas Legislature has the authority to change the laws of the Republic which were carried forward into Texas Statehood.[9]

B. *Important Factual or Other Errors Were Made by the Court in Roe.* The Court made a number of factual or other errors in *Roe,* most of which inflenced improperly the Court's main holdings:

1. *Erroneous Consideration of Texas as a Party.* In several places, the Court indicated that Texas was before the Court or was a party to the proceedings (410 U.S. at 116, n. 54 at 157, 159 and 162). This made it *appear* that a more full and fair proceeding was conducted.

Not only was Texas not a party (e.g., Record, *Roe v. Wade,* p. 109) but it could not have been a party because there would have been no constitutional jurisdiction in the U.S. District Court to entertain such a case. It is well established that federal judicial authority, as circumscribed by the 11th Amendment to the U.S. Constitution, does *not* extend to a suit brought against a state in a U.S. District Court by a citizen(s) of that state *unless,* of

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[9] An application of Petitioners' defense of unclean hands dealt with such revived anti-abortion law and should have been considered by the Court of Appeals.

course, the state consents to such a suit. *Hans v. Louisiana,* 134 U.S. 1, 9, 10-15 (1889) (leading case). The Plaintiffs in *Roe* were Citizens of Texas; they sued Henry Wade, District Attorney for Dallas County, Texas, in a U.S. District Court; and the State of Texas had not consented to such a suit.

On the other hand, it is settled that an action brought in a U.S. District Court against a state officer, challenging the constitutionality of a State statute or seeking to enjoin its enforcement on constitutional grounds, as in *Roe,* is not a suit against the State, and is not prohibited under the doctrine of sovereign imunity. *Ex parte Young,* 209 U.S. 123, 159-160 (1908); *Sterling v. Constantin,* 287 U.S. 378, 393 (1932). It is treated as against the officer alone, and *Roe* was such a case.

2. *Erroneous Purpose Ascribed to State Anti-abortion Statutes in the Late 19th and Early 20th Centuries.* As for the "original purpose" of state anti-abortion statutes, the Court said that "The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus" (410 U.S. at 151). It cited *State v. Murphy,* 27 N.J.L. 112, 114 (S.C. N.J., 1858), as an example authority for such statement. This statement and its context made it *appear* that the statutes were outdated purpose-wise, maternal health being protected by medical advances in the interim, and enhanced unfairly the Court's liberty to abort holding.

The fact of the matter is that, in the late 19th and early 20th centuries, state courts made it quite clear that the purposes or objects of their anti-abortion statutes were to protect or safeguard *either* the Unborn Child *or*

the Mother *and* the Unborn Child.[10] The Court's reliance on *Murphy* was poor because the Supreme Court of New Jersey pointed out *subsequently* that the statute which the *Murphy Court* construed "was further extended March 26th, 1872 * * * *to protect the life of the child* * * *." *State v. Gedicke, supra,* 43 N.J.L. at 90. (Emphasis added.) Moreover, *Murphy* appears to stand alone, *not* as an example of authority for the Court's statement.

3. *Unfair Portrayal of the Common Law, as Expounded by Coke, Concerning Abortion.* The Court provided an *unfair picture* of the Common Law as to abortion by referencing Cyril Means, Jr. ["The Phoenix of Abortional Freedom", etc., 17 *N.Y.L.F.* 335 (1971)] and Lawrence Lader [*Abortion* (1966), pp. 78-79], each of whom was active in the movement for the repeal of the abortion laws. See Nathanson, *Aborting America* (N.Y. 1979), pp. 55, 154 and 174 (Means), and pp. 29-36, 47-71, 82, 85, 116, 148-157, 163, 168, 172 and 307 (Lader). Means was especially critical of Coke's statements concerning abortion.

The Court should have examined Coke's abortion statements (3 *Inst.*, 50-51) in light of (1) the common law

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[10] *State v. Howard,* 32 Vt. 380, 399 (S.C. Vt., 1859) (Mother and Child); *Dougherty v. People,* 1 Colo. 514, 523 (S.C. Colo., 1872) (Mother and Child); *State v. Gedicke,* 43 N.J.L. 86, 89-90 (S.C.N.J., Feb. Term, 1881) (Mother and Child); *State v. Watson,* 1 P. 770, 771, 772 (S.C. Kan., 1883) (Child); *Dietrich v. Inhabitants of Northampton,* 138 Mass. 14, 17 (S.J. Ct. Mass., 1884) (Child) (dictum in tort case); *Edwards v. State,* 112 N.W. 611, 613 (S.C. Neb., 1907) (Mother and Child); *State v. Miller,* 133 P. 878, 879 (S.C. Kan., 1913) (Mother and Child); *State v. Tippie,* 105 N.E. 75, 77 (S.C. Ohio, 1913) (Mother and Child); *State v. Ausplund,* 167 P. 1019, 1022-1023 (S.C. Ore., 1917) (Mother and Child); *Nash v. Meyer,* 31 P. 2d 273, 276 (S.C. Idaho, 1934) (Child); *Bowlan v. Lunsford,* 54 P. 2d 666, 668 (S.C. Okla., 1936) (Child); and *State v. Cox,* 84 P. 2d 357, 361 (S.C. Wash., 1938) (Mother and Child).

authorities,[11] (2) the nature of a common law crime, i.e., "acts injurious to the public morals" or "acts which are mala in se" [Clark, *Handbook of Criminal Law* (3rd ed.) (1915), pp. 24, 25], and (3) how Coke was treated in this regard by English Courts and Legal Scholars.

In this latter regard, the Court of Chancery, in describing the rights of Unborn Children, said that the destruction of an Unborn Child was "murder" [*Millar v. Turner, supra,* 27 E. Repts. at 908 (preceded by a reference to 3 Coke, *Inst.* 50)], and referred to the live birth murder rule described by Coke [*Beale v. Beale, supra,* 24 E. Repts. 373 and *Burdet v. Hopegood, supra,* 24 E. Repts. 484, citing the *Beale* case]. While Sir Matthew Hale, who was Chief Justice of the King's Bench from 1671-1676, disagreed with the live birth murder rule, he agreed that it was a "great misprison" if a woman quick with child took or another gave her "a potion to cause abortion," or if one struck her "whereby [the] child within her is killed * * *." II Hale, *The History of the Pleas of the Crown* (1st Am. ed., with notes, etc. by Stokes and Ingersoll) (Phil., 1847), p. 563. The writings of William Hawkins, Thomas Wood and William Blackstone (all before 1803) were consistent with Coke's live birth murder and abortion statements. 1 Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood, London, 1824), ch. 13, pp. 94-95; I Wood, *An Institute of the Laws of England* (3rd ed., Holborn, Eng.) (1724), ch.

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[11] See, e.g., the four editions of *Boke of Justyces of Peas* (1506?, 1515, 1521 and 1544) which contain an indictment which charged, *inter alia,* the felonious slaying of an unborn child; and III Chitty, *A Practical Treatise on the Criminal law, supra,* pp. 798-801. Abortion remained an offense up to the enactment of Lord Ellenborough's Act, 43 Geo. III., c. 58 (1803), where abortion was first made a statutory offense in England. Abortion was also an offense in Scotland. See I *Select Justiciary Cases 1624-1650* (The Stair Society, Edinburgh, 1953), p. 81.

1, p. 11; I Blackstone, *Commentaries on the Laws of England, supra,* pp. 129-130; IV Blackstone, *Commentaries on the Laws of England, supra,* p. 198.[12] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States,* 195 U.S. 65, 69 (1904).

4. *Erroneous Implication that Only a Minority of U.S. Jurisdictions Treated the Abortion of a "Quick" Unborn Child as a Crime.* The Court said that "[t]his is of some importance [the alleged contradiction of Coke and the claim that abortion after quickening was never established as a common law crime] because while most American Courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a 'misprison,' a term they translated to mean 'misdemeanor'" (410 U.S. at 135). This made it *appear* that only a *minority* of U.S. Jurisdictions treated the abortion of a "quick" Unborn Child as a crime, and *buttressed unfairly* the Court's conclusion as to the "far freer" prevailing abortion practices in the major part of the 19th century (410 U.S. at 158).

The fact of the matter is that where the woman was "quick with child," *all* courts which considered the question (to Petitioners' knowledge) said that abortion was a crime, etc. at common law. E.g., *State v. Steadman,* 51 S.E. 2d 91, 93 (S.C.S.C., 1948); *Commonwealth v. Parker,* 50 Mass. 263, 266 (S.J. Ct. Mass., March Term, 1845); *Smith v. State,* 33 Me. 48, 55, 57 (S.C. Me., 1851); *State v. Alcorn,* 64 P. 1014, 1016 (S.C. Idaho, 1901); *State v. Cooper,* 22

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[12] The Preamble to Lord Ellenborough's Act referred to abortion and other acts as "heinous Offenses," and an indictment was returned for the offense of abortion shortly before enactment in 1803 of that Act. III Chitty, *supra, A Practical Treatise on the Criminal Law,* pp. 798-801.

N.J.L. 52, 58 (S.C.N.J., 1849); *Mitchell v. Commonwealth,* 78 Ky. 204, 210 (Ct. App. Ky., Sept. Term, 1879); *State v. Stafford,* 123 N.W. 167, 168 (S.C. Iowa, 1909); see *Gray v. State,* 178 S.W. 337, 338 (Tex. Crim. App., 1915). Where the woman was not "quick with child," *most* courts which considered the question said that abortion was not an offense at that stage of pregnancy. However, a *respectable minority* of U.S. courts concluded that it was an offense to abort at any stage of pregnancy. *Mills v. The Commonwealth, supra,* 13 Pa. St. at 632-633; *State v. Slagle, supra,* 82 N.C. at 567-568, and 83 N.C. at 545; *State v. Reed,* 45 Ark. 333, 334-336 (S.C. Ark., 1883); *Munk v. Frink,* 116 N.W. 525, 527 (S.C. Neb. 1908).

5. *Erroneous Claim as to When the States Began Generally To Replace the Common Law with Legislation.* The Court said that "It was not until after the war between the States that Legislation began generally to replace the common law" (410 U.S. at 139). This made it *appear* that State anti-abortion legislation was a latter-19th century development, and it *enhanced unfairly* the Court's "far freer" abortion practice view, above.

The fact of the matter is that, when the War between the States ended (April-May, 1865), there were only 36 States of the United States and, of that number, 27 States had anti-abortion statutes then in effect. See Dissenting Opinion of Justice Rehnquist in *Roe v. Wade,* 410 U.S. at fn. 1, pp. 175-176.

6. *Erronoeus Use of Maternal Mortality Rates.* The Court said, "Mortality rates for women undergoing *early abortions,* where the procedure is legal, appear to be as low as or lower than the rates for *normal childbirth*" (410 U.S. at 149). (Emphasis added. Footnote and footnote reference no. omitted.) The Court used this (1) to show that

the concerns of the States in enacting their anti-abortion statutes of protecting women from a hazardous procedure were no longer valid, and (2) to support the Court's conclusion as to when the State's interest in protecting maternal health became "compelling."

The Court, however, *misused* what it had noticed: The proper mortality comparison was not female deaths from "early abortions" versus female deaths from childbirth because the subjects of comparison were markedly different. Childbirth lasts 3 trimesters; "early abortions" occur in or around the first trimester. The proper procedure would have been to compare the number of maternal deaths resulting from a *specified number of early abortions* with the number of maternal deaths in or around the first trimester resulting from the same number of *early pregnancies.* The Court's use of the mortality rates, in short, was palpably erroneous and unfair.[13]

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[13] The Court apparently was unaware of the facts (1) that the concept of human fertilization was not understood until after the discovery of the mamalian ovum (of a dog) in 1827 [Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9], thereby making substantially less significant the failure of the later Common Law to cover abortions before the woman was "quick with child"; and (2) that the first anti-abortion enactment in this country was that of the New York City Common Council of July 27, 1716, which, *inter alia,* prohibited midwives, under penalty of fines or jail terms in default of payment, from giving counsel or administering any "Herb Medicine or Potion, or any other thing to any Woman being with Child *whereby She Should Destroy or Miscarry of that she goeth withall before her time*" [*New Perspectives on Human Abortion* (ed. by Hilgers, Horan and Mall) (Frederick, Md., 1981), ch. 15, p. 199, citing "Minutes of the Common Council of New York" 3 (1712-1729): 121, at fn. 2, p. 203 (Emphasis added.)], thereby showing a serious early concern for the problem of abortion and without reference to any "quick with child" distinction.

CONCLUSION

For the reasons and authorities stated, it is submitted respectfully that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1988

APPENDIX

Affirmed and Majority and Dissenting Opinions filed May 21, 1987.

RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL., Appellants
No. B14-85-794-CV

VS.

AARON WOMEN'S CLINIC, Appellee

Appeal from the 125th District Court
of Harris County, Texas
Trial Court No. 85-41159

OPINION

This is an appeal from a final judgment granting a permanent injunction against "right to life" demonstrators at a women's clinic. Appellants (Right to Life Advocates, Inc., Craig K. Andersen, J. (Jim) Bailey, Lee P. Helmke, Gary Loth, Barbara A. Martone, John A. Martone, Kathy Mathems, Sheila McIntosh and Joseph P. Pesl) raise ten points of error on appeal. Appellants allege that they had rights under the Texas Constitution to conduct their activities; that appellee failed to establish either irreparable injury or the lack of an adequate remedy at law; that the judgment and related writ of injunction are unconstitutionally vague and overbroad and that the judgment is not supported by the evidence; that appellee is precluded by the doctrine of unclean hands from receiving equitable relief; and that the trial court abused its discretion in awarding costs to appellee and in failing to dismiss appellee's severed action for damages. Appellants also collaterally

attack the constitutionality of *Roe v. Wade,* 410 U.S. 113 (1973). We affirm the trial court's judgment.

Appellee Aaron Women's Clinic (an assumed name of Orient Sales Corporation) rents approximately one-tenth of the total office space in a building located at 6420 Hillcroft, Houston, Texas. Appellee provides pregnancy-related services, including birth control services, pregnancy testing and pregnancy terminations. Pregnancy terminations are generally scheduled on Saturday mornings. In mid-May 1985, and on each Saturday thereafter, appellants began assembling at the clinic. Some appellants carried picket signs on the public sidewalk in front of the building while others distributed literature and attempted to engage in "sidewalk counseling" with persons arriving at the building. The latter activities took place on the building's parking lot, on the interior sidewalks and near the doors to the building. Testimony varied as to the degree of obstruction, harassment and disorderliness. However, no one disputes the fact that appellants' purpose was to prevent the termination of the pregnancies of the women attempting to enter the clinic. Following unsuccessful efforts by building and clinic personnel to get the demonstrators to leave the premises, the clinic filed suit for a temporary restraining order, a temporary injunction, a permanent injunction and damages.

The trial court held a hearing on the temporary injunction on July 30 and 31, 1985. On August 14th the court issued a Memorandum of Opinion, ruling that appellee was entitled to a temporary injunction. The parties then stipulated that the evidence presented at this hearing would be incorporated at the trial on the merits of the cause for

injunctive relief. The injunction issue was severed from the damage issues by agreement of the parties. That trial was held on August 16th with each side presenting some additional evidence and argument. At the conclusion of the trial the court rendered judgment enjoining appellants from the following:

> [E]ntering or trespassing onto any portion of the private property of Plaintiff located at 6420 Hillcroft, Houston, Harris County, Texas, specifically including, but not limited to, the private parking lot of the office building at 6420 Hillcroft, the three doorways to the office building at 6420 Hillcroft, and the interior of the office building at 6420 Hillcroft, in order (1) to conduct any demonstrating, picketing, or counseling; (2) to physically confront, intimidate, or harass any customer, potential customer, employee, invitee, or tenant of the office building at 6420 Hillcroft; or, (3) to distribute or broadcast any information, in written or oral form, specifically including, but not limited to, pamphlets and leaflets.

This appeal followed.

"Right to life" vs. "Pro-Choice" is the underlying issue notwithtsanding the fact that the legal issue presented is freedom of speech vs. freedom of personal choice, right to property and freedom to conduct a lawful business. Here, appellants seek access to privately-owned commercial property to impress their views on adult females who are exercising their lawful right to terminate pregnancy, and to prevent the clinic from operating a lawful business. We will not comment on the morality of the parties or the issues, as that is not our function. However, we will protect the lawful rights of the parties as the law directs us.

Appellants' points of error one through four and six through eight complain that the district court's judgment

and related writ of injunction are erroneous and unlawful. Appellants base this complaint on several arguments. In their first point of error, appellants claim they have the right under the Texas Constitution to engage peacefully in free expression activities on the parking lot and interior sidewalks involved in this suit. They contend that right is predicated upon art. 1 § 8, which provides in part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

The United States Supreme Court has determined that a state may adopt in its own constitution individual liberties more expansive than those conferred by the federal constitution. *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980).

Although private property is involved in this case, it is not determinative of the appeal as more and more states provide access to private property (primarily shopping malls and private universities) for peaceful speech, assembly, pamphleting or petitioning purposes. See *Robins v. PruneYard Shopping Center,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd,* 447 U.S. 74 (1980); *State v. Schmid,* 84 N.J. 535, 423 A.2d 615 (1980); *Commonwealth v. Tate,* 495 Pa. 158, 432 A.2d 1382 (1981); *Alderwood Associates v. Washington Environmental Council,* 96 Wash. 2d 230, 635 P.2d 108 (1981). Appellants assert that a balancing of the competing constitutional interests, private property versus free expression, should have been considered by the trial court. We note, however, that although the court expressed doubts during the permanent injunc-

tion hearing that balancing is required unless property is characterized as quasi-public, in its Memorandum of Opinion the court did cite three factors to consider when balancing and it applied those factors to the facts in this case.

As set out by the New Jersey Supreme Court (and adopted with slight variation by other state courts) the factors include (1) the nature, purposes, and primary use of the property (i.e. its "normal" use); (2) the extent and nature of the public's invitation to use that property; and (3) the purpose of the expressional activity undertaken upon it in relation to both the private and public use of the property. *State v. Schmid,* 423 A.2d at 630. In an amicus curiae brief filed in this case, counsel for the Greater Houston Chapter of the American Civil Liberties Union and the Texas Civil Liberties Union contends that the district court placed a burden on the protestors to justify the extension of free speech onto private property. Instead, it is argued, the language of the Texas Constitution should be construed as creating a presumption in favor of free speech, even on private property, unless competing interests outweigh the constitution's preference for free speech. Before undertaking our own balancing of the three factors, we emphasize that we are looking at a set of facts specific to this case. Their weight is highly subjective. While we may be guided by other cases in reaching our decision, those cases are guidelines only. As the ACLU so aptly phrased it, "Different fact situations will produce a different balance."

We first examine the nature, purposes and primary use of the property. The five-story structure at 6420 Hillcroft is a general use office building with a variety of ten-

ants, including a construction company, accountants, doctors and a VISA center. A major thoroughfare and a public sidewalk front the building, while a parking lot and sidewalks surround it on three sides. According to the Rules and Regulations attached to appellee's lease, the parking lot is for the use of tenants and their employees, agents and invitees.

In considering the use of the property, it is important to note that all the building's tenants have the right to conduct their businesses lawfully without interference and to travel to and from their workplaces without obstruction or harassment. More specifically, the clinic has the legal right to practice medicine and its patients the legal right to consult with their doctors and choose to terminate pregnancies, also without interference or harassment.

Our next focus is the extent and nature of the public's invitation to use the property. There is no question that the tenants, including the clinic, conduct business with the public and, indeed, solicit that business. The clinic director testified that the clinic advertises in the local Yellow Pages. We find that this public solicitation differs, however, from that of shopping malls or private universities (the foci of the more recent cases seeking access to private property). The shopping mall has been said to have "assumed all of the characteristics of the downtown business district or town center." *Shad Alliance v. Smith Haven Mall,* 106 A.D.2d 189, 484 N.Y.S.2d 849, 859, *rev'd,* 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985). Though specific businesses within the mall advertise for specific customers, the mall also has become a place of entertainment and/or focal point of community activity to

which people may be invited to attend various events or simply sit and relax.

We do not find the open policy of a mall to apply to this property. To the contrary, the invitation from 6420 Hillcroft is not so much to use the facilities as it is to do business with specific tenants. In addition, the public is invited, *as clients,* to use the adjacent parking lot for purposes of parking vehicles. The property manager testified that the parking lot has never been advertised as a public forum (i.e., used for a political rally or a social function). Furthermore, the building's policy is to allow no soliciting, loitering, picketing or demonstrating either in the building or on the parking lot or surrounding sidewalks, and that policy is enforced by the owner and managers of the property.

Finally, we look at the purpose of the expressional activity undertaken upon the property in relation to both the private and public use of the property. Appellants are attempting to counsel with and distribute literature to parties who are visiting the clinic on Saturady mornings for pregnancy terminations. Their conduct thus directly relates to one aspect of the business conducted by the clinic within the building. Appellants argue that there is no reasonable alternative to the parking lot and interior sidewalks for reaching these parties, and that their activities are consistent with the state's interest in encouraging childbirth, protecting the potentiality of life and protecting the health of pregnant women. They argue further that the activities have been conducted peacefully, and appellee's rights of ingress, egress and parking have not been "meaningfully" violated or restricted.

When we analyze the facts and apply them to the balancing factors, we find that appellants' expressional activities are not in accord with the private and public uses of the office building. We hold that the private uses to which this particular building and the surrounding property are put, considered with its limited public use and the nature of the expressional activity sought to be conducted there, justify limiting the scope of appellants' activity.

As previously stated, the building provides office space for many tenants, who are paying for the peaceful enjoyment of that space. The parking lot is simply a parking facility adjacent to the building, and the interior sidewalks a means of access. Although Saturday is not commonly a workday, occupancy of the building at that time is not limited to the clinic's patients and employees. Appellants apparently did not differentiate among those whom they approached, and several tenants complained about the protestors in the parking area. Witnesses testified that their exit from vehicles and entry to the building were blocked by appellants. Although no violence was used, the freedom of movement of the business invitees was restricted by appellants. It is undisputed that appellants' purpose was to prevent the pregnant women from doing business with the clinic. Appellants therefore interfered with the lawful purposes of both patient and clinic. The public is not invited into or onto the property at 6420 Hillcroft for any and all purposes, but only those purposes consistent with the lawful pursuit of the businesses within.

Appellants contend the injunction bars them from expressing their views. We disagree. The injunction does not prevent appellants from picketing from the public sidewalk in front of the building. This area is not included in

the injunction. Appellants' signs are clearly visible to anyone entering or exiting the building and the clinic's patients are free to approach appellants for counseling if the patients so desire. In short, we find appellants' alternate means of communication to be reasonable in this instance, and the injunction a reasonable restraint.

Of major importance in this case is the physical and mental well-being of the clinic's patients. Whether or not we agree with their decisions to terminate their pregnancies, we must recognize their right to do so. Further, we cannot assume, as appellants suggest, that they have made this decision without thought and informed reasoning. A witness testified that she saw one couple arrive and leave three times before they could enter the building because they were intimiated by appellants. Other witnesses testified that patients were visibly upset by their confrontations with the demonstrators. During oral argument appellants' counsel stated that if those approached by the demonstrators did not wish to listen, they could "walk on by." However, the record raises doubts as to their freedom to avoid and escape the confrontations. Demonstrators often approached people at their car doors and then followed them to the doors of the building. The women's right to privacy and lawful right of choice must be protected. *See* related discussion in *Bering v. Share,* 106 Wash. 2d 212, 721 P.2d 918, 927-29 (1986).

We hold that appellants' right to engage in free expression activities does not extend to the parking lot and interior sidewalks at 6420 Hillcroft. While we recognize the importance of freedom of speech in our society, it must be balanced against the rights of individuals to be free in

their choice of lawful pursuits. Although we are free to think, follow and express our personal beliefs, we cannot force our thoughts and beliefs on others. Likewise, we cannot impose our moral judgments on others whose thoughts and beliefs, although contrary to ours, are nonetheless important an dentitled to protection under the laws of this state and this nation. The right of free speech is not an absolute right which may be indiscriminately exercised under all circumstances and conditions or a right which may be exercised everywhere. *Shad Alliance,* 484 N.Y.S.2d at 863 (Niehoff, J., dissenting).

This opinion is not based simply on the fact that the property is private, but rather is based on a balancing of factors in which the private use outweighs appellants' attempted public use. To paraphrase one court, 6420 Hillcroft is operated as a market place for the exchange of goods and services but not as a market place for the exchange of ideas. *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.,* — Pa. —, 515 A.2d 1331, 1337 (1986). Point of error one is overruled.

Appellants' second and third points of error allege that appellee was not entitled to injunctive relief because it failed to establish irreparable harm and no adequate remedy at law. While appellants admit that deprivation of one's constitutional rights would amount to irreparable injury, they assert that no such showing was made. Appellants argue that the private property at issue, the parking lot and interior sidewalks, is not specifically covered by appellee's lease; therefore, appellee's leasehold or possessory rights were not violated by the enjoined activity.

They contend that only the owner's rights are at issue, and the owner is not a party to this suit. In addition appellants contend there was no injury to appellee's rights of ingress, egress or parking.

We disagree with both assertions. Under the terms of the lease, appellee leased approximately 3,515 square feet in the building. Adjacent to the building is a general parking area with no assigned spaces for tenants. The parking provision (Sec. 1. B.) reads as follows:

> Lessor also leaves to Lessee N/A unassigned parking spaces, or assigned parking spaces if Lessor should so desire, in the garage at a monthly rate of N/A per space.

Aileen Dail, property manager for the building's owner, testified that the parking provision means that the lessor is not charging for parking. Under Sec. 6 (i) appellee agreed to pay, as additional rental, its proportionate share of any increases in the lessor's costs of maintaining the parking areas. While lessor does indeed retain control over the parking lot (Sec. 8), appellee, its employees, agents and invitees have the right to park in the lot subject to certain requirements. (Rules and Regulations No. 12). Thus, by virtue of the lease and the understanding of the parties, appellee has rights in and to the parking lot. Further, a lease of premises may necessarily include the space required for the parking of a motor vehicle, and a tenant, whose lease of a building or of space in a building expressly includes the right to use an adjacent parking area, has been held to acquire an easement in that area. 51C C.J.S. *Landlord & Tenant* § 295(2) (1968). On the basis of the lease and the property manager's testimony,

we hold that appellee has a leasehold right, contractual and equitable in nature, in the parking lot.

Under Texas law, a tenant is entitled to recover for specific injuries to his leasehold estate as the owner recovers for injuries to the fee. *Bauer-Smith Dredging Co. v. Tully,* 305 S.W.2d 805, 813 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.), cert. denied, 358 U.S. 842 (1958). A tenant may also seek an injunction where the disturbance complained of will cause irreparable injury to his property rights and for which there is no adequate redress at law. 49 Tex. Jur. 3d *Landlord and Tenant* § 106 (1986); *see Southwest Weather Research, Inc. v. Jones,* 160 Tex. 104, 327 S.W.2d 417 (1959).

While the building's owner is not a party to this suit, we find from the actions of its property manager that appellee has the owner's tacit approval to pursue the suit, and further, we find joinder of the owner unnecessary. The owner's policies concerning soliciting, loitering, picketing and demonstrating within and without the building have not been disputed. When the demonstrations against the clinic began, the property manager consulted with the owner and drafted two memorandums to the security guards outlining procedures to be followed in dealing with the demonstrators. The memos did not expressly state that the demonstrators were to be kept off the parking lot; however, when the trial court asked, "Do I understand, notwithstanding the memo, that it is the position of the property owners that any demonstration, picketing, or people present on the parking lot or on the sidewalks surrounding the building is to be prohibited?", the manager responded affirmatively. Finally, the clinic director testified that the

property manager called to tell her about complaints from other tenants and asked what appellee intended to do about the situation. We find this implies that authority to act was given by the owner, through the manager, to the appellee.

Apart from the owner/tenant issue, as noted by the trial court in its Memorandum of Opinion, appellee has an independent basis for standing to bring this suit. The court cites *Housing Authority of Harlingen v. State ex rel. Velasquez,* 539 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) as stating the Texas rule on standing.

> [A] person has standing to sue, if: (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, ethic, recreational, environmental, or otherwise; or (5) he is an appropriate party to assert the public's interest in the matter, as well as his own interest. (citations omitted)

Id. at 913-14. Appellee is the specific target of the demonstrators and thus has a personal stake in the controversy.

Appellants further contend that there has been no injury to appellee's rights of ingress, egress or parking. We disagree. One escort testified that the demonstrators attempted to obstruct people getting out of their cars and refused to step aside. Also, she observed that as people moved toward the building, the demonstrators did not readily step out of the way but continued talking as they

were moving backwards toward the building and blocking the path. A clinic employee testified that she was often detained by the demonstrators, even after they discovered that she was an employee. The woman was six and one half months pregnant at the time. She stated that the demonstrators continued to try to talk to her after she told them she did not want to listen. She testified she felt they were bothering her and harassing her because she was employed by the clinic.

We find that the violation of appellee's constitutional property rights caused irreparable harm. Furthermore, although appellee has sued for damages for loss of business and goodwill, money damages is not a sufficient remedy where appellee faces a continuation of picketing and harassment by appellants. An injunction limiting appellants to the public forums is the only adequate remedy. Points of error two and three are overruled.

In point of error four appellants complain that the judgment and writ of injunction are unconstitutionally vague and overbroad and therefore violate art. I, § 8 of the Texas Constitution. They argue that the language is overbroad in that it covers individuals Craig Andersen, Gary Loth and Joseph Pesl, who were not shown to have been on the premises during the demonstrations, but who were engaged in picketing activities on the public sidewalk. It further operates to cover unnamed directors, officers and possibly members of Right to Life Advocates, Inc. who also were not shown to have been on the premises during the demonstrations. Its effect is to prohibit all forms of demonstrating, picketing and counseling, as well as all forms or methods of communication, on any subject, and thus it operates as a prior restraint on free expression

activities unrelated to this lawsuit. In addition, they contend the language operates to restrict such "entering or trespassing" for the described purposes without regard to the owners interests, including the possible giving of his consent. Finally, it is argued that the language is vague in that "to physically confront" is not defined and to "intimidate" and to "harass" do not present a clear standard of restraint. Appellants claim these terms are subject to debate, depending upon the individual approached.

Point of error four ignores the fact that the trial court found appellants were not entitled to access to 6420 Hillcroft for free speech purposes. The judgment and writ of injunction prohibits Craig Andersen, Gary Loth and Joseph Pesl, as well as anyone else associated with Right to Life Advocates, Inc., from engaging in certain specific specific activities (the very activities which they had been conducting) *on private property.* They are not prohibited from continuing these activities from public areas. Appellants' argument that the owner is adversely affected by the injunction is not relevent and appellants are without standing to complain. Point of error four is overruled.

Appellants next assert that appellee had unclean hands and therefore was not entitled to injunctive relief. In this regard, appellants point to appellee's violation of certain civil statutory law of Texas (point of error six); appellee's violation of certain Texas criminal anti-abortion law revived as a legal effect of *Roe v. Wade* (point of error seven); and appellee's violation of certain Texas criminal anti-abortion laws which the United States Supreme Court purported to hold unconstitutional in *Roe v. Wade* (point of error eight).

The unclean hands doctrine relied upon by appellants requires that one who comes into a court of equity must come with "clean hands." This is to say, a court may refuse to grant relief to a plaintiff who has been guilty of unlawful or inequitable conduct regarding the issue in dispute. *Grohn v. Marquardt,* 657 S.W.2d 851, 855 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). However, as appellee points out, a party asserting the unclean hands defense must show that he, and not some third party, has been injured by plaintiff's conduct. *Omohundro v. Matthews,* 161 Tex. 367, 341 S.W.2d 401, 410 (1960). Appellants recognize that general rule but rely on a line of cases which they contend denies equitable relief to a party who is engaged in a legal wrong or trespass. Our examination of those cases reveals no clear deviation from the requirement of injury to the complaining party. Although appellants allege injury to third persons in points of error six through eight, they have shown no injury to themselves. Points of error six through eight are therefore overruled.

In point of error five, appellants argue that the judgment is erroneous and unlawful because it is not supported by the evidence generally, and as applied to certain appellants. More specifically, appellants claim that four of the trial court's findings and conclusions are not supported by the record. Those findings and conclusions are that appellee had a vested legal right to be protected and that right was in imminent danger of harm or damage by the conduct of the appellants; that irreparable injury would result to appellee unless an injunction were issued; that appellee had no adequate remedy at law; and that appellee was entitled to the relief given. In addition, appellants assert that there was no basis in the record for

enjoining appellants Andersen, Loth and Pesl from engaging in the conduct specified in the first paragraph of the judgment as they engaged only in picketing activities on the public sidewalk.

In responding to appellants' points of error one, two and three, we thoroughly reviewed appellee's legal standing vis-a-vis the interior sidewalks and parking lot, as well as its entitlement to the injunction. In point of error four, we discussed the trial court's prerogative to order certain parties off the Hillcroft property once it determined the property's private uses clearly outweighed its public use. It was proper to enjoin appellant and all its members, whether or not they trespassed on private property on the date in question. We therefore overrule point of error five.

In point of error nine, appellants find error and abuse of discretion in the district court's award of $977 in costs to appellee. They argue that good cause existed for each party to bear its own costs. In general, the successful party at trial recovers costs from its opponent. Tex. R. Civ. P. 131. When there is good cause, the court may adjudge costs otherwise. Tex. R. Civ. P. 141; *Perez v. Hernandez*, 658 S.W.2d 697, 702 (Tex. App.-Corpus Christi 1983, no writ). Appellants argue that there is good cause in this case because it is one of the first impression in Texas. In appellants' words, these were "[f]ree expression activities undertaken peacefully, in good faith and in the context where authoritative law has not warned against the same . . ."

We find that a trial court possess broad discretion to assess court costs, and the assessment should not be

disturbed without a clear showing of abuse of that discretion. *Brook Mays Organ Co. v. Sondock,* 551 S.W.2d 160, 165 (Tex. Civ. App.-Beaumont 1977, writ ref'd n.r.e.). We find no such abuse. Most parties go into court with a good faith belief in their cause. However, this does not justify requiring their opponents to help bear the costs of attempting to vindicate erroneous beliefs. Point of error nine is overruled.

Lastly, appellants allege abuse of discretion in the trial court's refusal to dismiss appellee's severed cause of action for damages or to modify its opinion in relation to that cause of action. Appellants argue that the court's granting of the injunction will prejudice them in a trial on the damages. They also argue that the trial court in effect established a new property and constitutional law rule, and was therefore duty-bound to protect appellants from monetary exposure resulting from conduct against which no such rule had previously been applied by the courts. They cite a 1978 Supreme Court property law case in which the Court refused to apply a new ground of recovery to the cause of action before it. The Court stated that this is seldom done when rules of property law are involved because of the importance of precedence where problems regarding land or contracts are concerned. *Friendswood Development Co. v. Smith-Southwest Industries, Inc.,* 576 S.W.2d 21, 30 (Tex. 1978). We note, however, that the Court went on to cite deeds, property transactions and land developments as the areas of property law in which parties should be able to rely on the law which existed at the time of their actions. *Id.* at 30-31.

The cause of action for monetary damages for trespass, tortious interference with business and contractual

relations, libel and slander was severed from the request for injunctive relief by agreement of the parties. No testimony was allowed concerning damages. Though the claim for damages is based on the same conduct made the basis of the injunctive relief, the outcome of the one should not affect the other. Because of the wrongful acts of appellants, the injunction was necessary to establish appellee's property rights. We cannot deny appellee's rights because of a potential prejudice in the determination of damages. Appellee must still present evidence and prove any monetary losses, as a civil action for damages will not lie unless some damages are proven. *Matrix Computing, Inc. v. Davis*, 554 S.W.2d 288, 290 (Tex. Civ. App.-Amarillo 1977, no writ). We find no merit in appellants' argument and thus overrule point of error ten.

We affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment Rendered and Majority and Dissenting Opinions filed May 21, 1987. Panel consists of Justices Paul Pressler, Ross A. Sears and Bill Cannon. Publish-Tex. R. App. P. 90.

Affirmed and Majority and Dissenting Opinions filed May 21, 1987.

RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL., Appellants

No. B14-85-794CV

VS.

AARON WOMEN'S CLINIC, Appellee

Appeal from the 125th District Court
of Harris County
Trial Court No. 85-41159

DISSENTING OPINION

I respectfully dissent. Peaceful picketing and leafletting are expressive "speech" activities protected by the First Amendment. *United States v. Grace,* 461 U.S. 171, 176, 103 S. Ct. 1702, 1706, 75 L.Ed.2d 736 (1983). However, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647, 101 S. Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). A state may impose *reasonable* time, place and manner restrictions upon all expression, whether written, oral or symbolized by conduct. *Clark v. Community for Creative Non-Violence,* 468 U.S. 228, 104 S. Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). Such restrictions are valid if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace,* 461 U.S. at 177, 103 S. Ct. at 1707 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L.Ed.2d 794 (1983).

There are many reasons why this injunction should be dissolved. In the labored majority opinion there are numerous wordings and assumptions which are invalid, but it will do no good to dissect its verbosity as the particular facts are such that it would be most surprising if the majority opinion would be used as authority for other

cases. Suffice it to say that the language of the injunction is overbroad in that it covers Craig Anderson, Gary Loth and Joseph Pesl, who were not shown to have been on the premises during the demonstrations. It enjoins unnamed directors, officers and members of Right to Life Advocates, Inc. who were not shown to have been on the premises during the demonstrations. Its effect is to prohibit all forms of demonstrating, picketing and counseling, as well as all forms or methods of communication, on *any* subject. Thus it operates as a prior restraint on free expression activities unrelated to this lawsuit. In addition, the language operates to restrict "entering or trespassing" without regard to the owner's interests, including the possible giving of his consent. The record indicates that the owner tactly consented to the activities of the appellants. The appellants received no notice of any policy of the owner against allowing protestors on the premises until after the demonstrations had ceased. Finally, the language is vague in that "to physically confront" is not defined and to "intimidate" and to "harass" do not present a clear standard of restraint. This injunction is overly broad and vague. It is neither a reasonable restriction on expression nor is it narrowly tailored to serve a significantly governmental interest. The injunction should, therefore, be dissolved.

/s/ Paul Pressler
Justice

Majority and Dissenting Opinions filed May 21, 1987.
Panel consists of Justices Paul Pressler, Ross A. Sears and Bill Cannon.

Publish—TEX. R. APP. P. 90

May 21, 1987

RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL., Appellants

No. B14-85-794-CV

VS.

AARON WOMEN'S CLINIC, Appellee

Appeal from the 125th District Court
of Harris County, Texas
Trial Court No. 85-41159

JUDGMENT

This cause, an appeal from the judgment in favor of AARON WOMEN'S CLINIC, signed August 16, 1985, came on to be heard on the transcript of the record. The same having been inspected, it is the opinion of this Court that there is no error in the judgment. It is ordered and adjudged that the judgment of the Court below be affirmed.

In addition, it is ordered that appellants, RIGHT TO LIFE ADVOCATES, INC., ETC., CRAIG K. ANDERSEN, J. (JIM) BAILEY, LEE P. HELMKE, GARY LOTH, BARBARA A. MARTONE, JOHN A. MARTONE, KATHY MATHEMS, SHELIA McINTOSH and JOSEPH J. PESL, and their Surety, LAWYERS SURETY CORPORATION, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance.

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Fourteenth Court of Appeals of the State of Texas, at Houston, do hereby certify that the preceding one page(s) contain a true and correct copy of Court's judgment rendered May 21, 1987 in Cause No. B14-85-794-CV RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL., Appellant VS. AARON WOMEN'S CLINIC, Appellee from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 26th day of April, 1988.

MARY JANE SMART, CLERK

By /s/ David T. Richardson
SEAL DEPUTY

Motion for Rehearing Denied and Concurring Opinion filed September 10, 1987.

SEAL

Fourteenth Court of Appeals

NO. B14-85-794-CV

RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL., Appellant

V.

AARON WOMEN'S CLINIC, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 85-41159

CONCURRING OPINION

On motion for rehearing, I withdraw my approval of the majority opinion. I concur in the result only.

/s/ Bill Cannon
Justice

Judgment Rendered and Opinion filed September 10, 1987.
Panel Consists of Justices Paul Pressler, Ross A. Sears, and Bill Cannon.

Publish - TEX. R. APP. P. 90.

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Fourteenth Court of Appeals of the State of Texas, at Houston, do hereby certify that the preceding one page contains a true and correct copy of Court's opinion filed September 10, 1987 in Cause No. B14-85-794-CV RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL., Appellant VS. AARON WOMEN'S CLINIC, Appellee from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 26th day of April, 1988.

MARY JANE SMART, CLERK

By /s/ David T. Richardson
SEAL DEPUTY

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* * * Fourteenth Court of Appeals * * *
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 10, 1987

Hon. Thomas C. Sanders
Leger & Hall, P.C.
5847 San Felipe
Suite 1250
Houston, TX 77057

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. John W. Berkel
3420 Two Houston Center
909 Fannin
Houston, TX 77010

RE: CASE NO. 14-85-00794-CV TRIAL COURT CASE NO. 85-41159

STYLE: Right to Life Advocates, Inc., etc., et al
V: AaronWomen's Clinic

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, October 12, 1987.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Michael O'Brien
Judge, 125th District Court
301 Fannin
1st Floor
Houston, TX 77002

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Court of Appeals, Fourteenth Supreme Judicial District of the State of Texas, at Houston, do hereby certify that the preceding one page(s) contain a true and correct copy of the Court's letter dated September 10, 1987 overruling appellant's

motion for rehearing. (sic) in Cause No. 14-85-794-CV, Right to Life Advocates, Inc., etc., et al VS. Aaron Women's Clinic from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 16th day of May, 1988.

MARY JANE SMART Clerk

By /s/ Charlene Mitchell
Deputy

SEAL

IN THE SUPREME COURT OF TEXAS

NO. C-6886,	)	February 10, 1988
	)	
RIGHT TO LIFE ADVOCATES, INC. ET AL.	)	From HARRIS County,
	)	
vs.	)	Fourteenth District.
	)	
AARON WOMEN'S CLINIC	)	

— — — —

Application of petitioners for writ of error to the Court of Appeals for the Fourteenth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicants, Right to Life Advocates, Inc. et al., and surety, Lawyers Surety Corporation, pay all costs incurred on this application.

****

IN THE SUPREME COURT OF TEXAS

— — — —

NO. C-6886,	)	March 16, 1988
	)	
RIGHT TO LIFE ADVOCATES, INC. ET AL.	)	From HARRIS County,
	)	
vs.	)	Fourteenth District.
	)	
AARON WOMEN'S CLINIC	)	

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

****

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the attached are true and correct copies of the orders of the Supreme Court of Texas in NO. C-6886, styled RIGHT TO LIFE ADVOCATES, INC. ET AL. V. AARON WOMENS (sic) CLINIC as said orders appear in the minutes of this court under the dates indicated.

IN TESTIMONY WHEREOF, witness my hand and the SEAL OF THE SUPREME COURT OF TEXAS at the City of Austin, this the 21st day of March, 1988.

/s/ Mary M. Wakefield
Mary M. Wakefield

SEAL

NO. 85-41159

AARON'S WOMEN'S CLINIC	)	IN THE DISTRICT COURT OF
VS.	)	HARRIS COUNTY,
RIGHT TO LIFE ADVOCATES, INC. et al.	)	TEXAS
	)	125TH JUDICIAL DISTRICT

MEMORANDUM OF OPINION

I.

FACTUAL BACKGROUND

After hearing on Plaintiff's request for a Temporary Injunction, this Court must now decide the difficult socio-constitutional question of the protestors rights of free speech and assembly balanced against a competing claim of a lessee's right to be free in the use of the property.

The Plaintiff is AARON'S WOMEN'S CLINIC, a Texas Corporation which operates a medical clinic where, among other pregnancy related services, abortions are performed. The clinic is located on the fifth floor of a privately owned office building located at 6420 Hillcroft, Houston, Texas. Plaintiff is not the owner of the property, but is a tenant in the building.

The Defendants constitute individuals and organized groups, who are passionately committed to opposition of the performance of abortions at this clinic and elsewhere.

Sometime in April/May, 1985, the Defendants began organized picketing and leaflet distribution at the clinic. The protest would occur only on Saturdays, the day when the clinic performs the abortions. The protestors would arrive early in the morning around 7:00 a.m. and would remain for about two (2) hours. The protestors would position themselves in basically two (2) locations. A group of pickets would walk with placards on the public sidewalk fronting Hillcroft Avenue. Another group of individuals would stand in the parking lot, and near the entry doors to the building. When patients of the clinic arrived at the parking lot, the protestors would approach the vehicle and its occupants and attempt to distribute their leaflets. While the protestors would move out of the path of a patient if requested, the protestors blocked the ingress to the building by surrounding the patient and visitors in an attempt to dissuade them from having an abortion.

Although no violence has yet occurred, several of the witnesses acknowledged that violence will undoubtedly erupt from these encounters. This is evident from the very nature of the deep rooted beliefs and emotions accompanying this very violatile issue.

As pertinent herein, the Plaintiff's suit seeks to enjoin Defendants from picketing, demonstrating, or distributing any leaflets on the parking lot or any other allegedly private portion of the premises. Plaintiff correctly recognizes that Defendants have a right to exercise their rights of free speech and assembly on the public sidewalk.

Defendants, on the other hand, argue that the parking lot is a quasi-public forum for expression of their beliefs.

Alternatively, if it is private property, it is argued that this Court should balance the constitutional interests involved because of the urgency of their message and the lack of suitable alternatives to convey the messages to the patients arriving at the clinic, if the protestors are confined to the public sidewalk. Defendants are not seeking to go into the building for the purpose of their protest.

Thus, the battle lines are drawn over the Defendants' right to protest in the parking lot of this privately owned office building.

II.

ISSUES PRESENTED

The Defendants have raised a plethora of issues in opposition to the issuance of an injunction. For the sake of clarity, they will be grouped for discussion into three (3) basic arguments: (1) Plaintiff lacks standing to bring this suit; (2) Defendant[s] have a constitutional right to exercise their right of free speech and assembly in the parking lot area; (3) Plaintiff has "unclean hands," and thus is not entitled to injunctive relief.

This Court will separately analyze each of these contions beginning first with the threshold of standing.

III.

PROCEDURAL ISSUES:

STANDING TO BRING SUIT

Within the context of this case the issue of standing centers on Defendants contention that Plaintiff, as a

lessee, may not assert the constitutional rights of the owner of the private property to be free in the use of his property as against the Defendants rights of free speech and assembly. Defendants rely on the well-settled proposition that constitutional rights are personal, and cannot be asserted vicariously or through third parties. *NAACP v. Alabama,* 357 U.S. 449, 786, (sic) S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). But accepting for the moment Defendant's argument that the owner's right to prohibit all political activity on its premises is a separately owned right separate and distinct from the tenant's right to prevent only such activity that interferes with the quiet enjoyment of the leased premises, the Plaintiff still has an independent basis for standing to bring this suit.

The concept of standing has its genesis in the notion that Courts do not render advisory opinions. This limitation on the exercise of judicial power is present both in the Texas common law and in the "case of controversy" requirement of Article III of the U.S. Constitution before a federal court may assure jurisdiction. *Flast v. Cohen,* 392, (sic) U.S. 83, 88 S. Ct. 1942, 20 L.Ed. 947 (1968); *Hunt v. Bass,* 664 S.W.2d 323 (Tex. 1984); *City of San Antonio v. Stumberg,* 70 Tex. 366, 7 S.W. 754 (1888); *Texas Industrial Traffic League v. R. R. Comin of Texas,* 628 S.W.2d 187 (Tex. Civ. App—Austin 1982) *rev'd,* 663 S.W. 2d 821 (Tex. Sup. 1982). In order to invoke judicial review, the party seeking relief "must allege such a personal stake in the outcome of the controversy so as to insure concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" *Flast*

v. Cohen, Supra. See extensive discussion of Texas law on standing in *Texas Industrial Traffic League v. R. R. Commin of Texas, Supra*: In *Housing Authority v. State ex rel. Velasquez,* 539 S.W.2d 911, (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.), the Appellate Court stated the Texas rule on standing as follows:

> ". . . [A] person has standing to sue, if: (1) he has sustained, or is immediately in danger of sustaining some direct injury as a result of the wrongful act of which he complains; (2) has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, ethic, recreational, environmental, or otherwise; or (5) he is an appropriate party to assert the public's interest in the matter, as well as his own interest . . . *Housing Authority v. State ex rel. Velasquez, Supra* at 913-914.

In the case at bar, Plaintiff has demonstrated the requisite "special injury" and/or "personal stake in the outcome of the controversy" to satisfy the standing requirement. The present controversy is not a remote conflict between the parties. Plaintiff is the specific target of the protestors, and the demonstrations are directed only to its members and patients. As lessee, Plaintiff maintains a contractual and/or equitable property interest in the parking lot. Therefore, this Court concludes that Plaintiff has standing to bring this suit.

With respect to Defendant's contention that Plaintiff lacks standing because of the failure to file an assumed name certificate with the Secretary of State, this argument misses the mark in failing to distinguish be-

tween the legal concept of standing and the lack of capacity to sue or be sued. As recognized in *Delvo-cepts, Inc. v. City of Galveston,* 668 S.W.2d 790 (Tex. App.—[14th Dist.] 1984, no writ), a challenge that a party lacks standing to sue is not the same thing as a challenge that a party lacks capacity to sue. In this case, Defendants have actually challenged the lack of capacity of Plaintiff to sue for failing to file the appropriate assumed name certificate. Unlike standing, this is a matter that can be cured by complying with the purpose of the statute while the litigation is pending. *Accord*[:] *Develo-Cepts, Inc. v. City of Galveston,* 668 S.W.2d 790 (Tex. App.—[14th Dist.] 1984, no writ); *Speier Tire Co., Inc. v. Tom Benson Chevyway Rental & Leasing, Inc.,* 643 S.W.2[d] 772 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.). Plaintiff has during the pendency of this suit filed the assumed name certificate with the Secretary of State's Office. There no longer exists any procedural impediment to Plaintiffs right to seek affirmative relief in Texas Court based on the lack of capacity to sue.

III.

SUBSTANTIVE ISSUES:

CONSTITUTIONAL RIGHT OF FREE SPEECH

Having resolved the threshold issue of standing, the more serious issue concerns the balancing of the very significant constitutional interests in this case. It is helpful first to set forth the analytical framework for this discussion.

While Defendants have frequently referred to their rights under the First Amendment to the U.S. Constitu-

tion, it is well-settled that the exercise of an individual's right of free speech and assembly on a privately owned shopping center, irrespective of its size or the character of the property, is not a protected activity under the First Amendment of the U.S. Constitution. *Lloyd Corp. v. Tanner,* 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1972); *Hudgens v. NLRB,* 424 U.S. 507, 96 S. Ct. 1029, 47 L.Ed 2d 196 (1976). This is so because the Federal Constitution prohibits governmental infringement of constitutional rights, and it does not protect against conduct of purely private actors. It cannot be seriously argued in this case that the Defendants can satisfy the "State action" requirement necessary to invoke the protection of the Federal Constitution. See e.g. analysis in *State v. Schmid,* 84 N.J. 535, 423 A.2d 615 (S. Ct. N.J. 1980) [,] *appeal dismissed sub nom., Princeton University v. Schmid,* 455 U.S. 100, 102 S. Ct. 867, 70 L.Ed.2d 855 (1982); Instead, Defendants must rely on the rights of free speech and assembly provided by Art. I, Sec. 8 of the Texas Constitution since state constitutional rights may surpass the guarantees of the Federal Constitution. *Pruneyard Shopping Center v. Robins*[,] 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed. 2d 741 (1980), *affirming,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979).

Although this is an issue of first impression in Texas, the courts in other jurisdictions have addressed this precise question. The decisions in other states seem in general agreement that in order to properly balance the constitutional interests, a court should consider three (3) general factors: (1) the nature, purposes and primary use of such private property, generally, its "normal"

use, (2) the extent and nature of the public's invitation to use that property and (3) the purpose of the expressional activities undertaken upon such property in relation to both the private and public use of the property. *State v. Schmid, Supra; Shad Alliance v. Smith Haven Mall,* 484 N.Y.S. 2d 849 (S. Ct. N.Y. 1985); *Western PA. Socialist Workers v. Conn. Gen.,* 485 A.2d 1 (S. Ct. Penn. 1984).

Applying this standard to the record in the case at bar, it becomes clear that Defendants must fail in their attempt to convert the privately owned parking lot into an arena for the expression of their beliefs. The primary, and in fact only, purpose for the parking lot is to serve in conjunction with the commercial activity in the office building. The lot is not designed as a gathering place or a place for expression of ideas. Loitering and other similarly related conduct is expressly prohibited. The public is invited only for the purposes of conducting business within the office buildings. In this regard, it is well-settled that a mere invitation to the public to engage in commerce does not convert a privately owned commercial property into a public or quasi-public forum. *Lloyd Corp. v. Tanner, Supra; Western PA. Socialist Workers v. Conn. Gen. Supra.*

This Court has carefully reviewed the state court decisions pro and con on this issue. In those cases allowing a limited intrusion upon private property for the exercise of free speech and assembly, each one involved a large shopping center, which due to their size, mode of operation and location maintain all the characteristics of a town center or central business district. *Compare Robins v.*

Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979) and *Shad Alliance v. Smith Haven Mall*, 484 N.Y.S. 2d 849 (S. Ct. N.Y. 1985) with *Cologne v. Westfarms Associates*, 192 [C]onn. 48, 469 A. 2d 1201 (1984) and *Western PA. Socialist Workers v. Conn. Gen.*, 485 A.2d 1 (S. Ct. Penn. 1985).

This Court has found no case factually similar to this case which supports Defendants positions. Rather, several Texas appellate decisions provide arguable precedent for Plaintiffs side of this issue. *Hoffart v. State*, 686 S.W.2d 259 (Tex. App.—Houston [14th Dist.] 1985, application for discret. writ pending).

IV.

INJUNCTIVE RELIEF:

UNCLEAN HANDS

Defendants final argument raises the question of Plaintiffs' entitlement to injunctive relief because of the nature of the activity being performed on Plaintiff's premises. Under the rubric of the "unclean hands," accompanied by a frontal assault on *Roe v. Wade*, 410 U.S. [1]13 (1973), Defendants contend that the performance of abortions on Plaintiff's premises is illegal and immoral, and that as a legal proposition an abortion clinic comes into Court with "unclean hands," which precludes any relief in equity.

Of course, it may confidently be suggested that the application of the "unclean hands" doctrine to the facts of this case is novel. Defendants have not cited nor has this Court's research revealed any caselaw authority on this point. However, applying current Texas law, it becomes

evident that the maxim of "unclean hands" does not bar Plaintiff's claim for relief.

In *Omohundro v. Matthews,* 341 S.W.2d 401 (Tex. Sup. 1960), the Texas Supreme Court held that the clean hands rule is not absolute; and aptly stated:

> "The party to a suit, complaining that his opponent is in court with 'unclean hands' because of the latters' conduct in the transaction out of which litigation arose or with which it is connected, must show that he himself has been injured by such conduct, to justify the applications of the principal to the case. The wrong must have been done to the defendant himself and not to some third party. *Omohundro v. Matthews,* Supra at 410.

Thus, the doctrine of unclean hands "does not operate to repel all sinnners from a court of equity." *Norris of Houston, Inc. v. Gafas,* 562 S.W.2d 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.)[.]

The doctrine of unclean hands cannot be used as a defense in this cause because the issue of the illegality or inequitable conduct of Plaintiff in performing abortions is collateral to the constitutional interests sought to be protected by this suit. *Grohn v. Marquardt,* 657 S.W.2d 851 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). Moreover, Defendants must show injury suffered by them as a result of the Plaintiff's conduct in order to justify application of the doctrine. *Omohundro v. Matthews, supra; Grohn v. Marquardt supra.* The injury alleged under this argument would be suffered by third parties, not by these Defendants.

Frankly, to accept Defendants' argument on this issue runs directly contrary to the Supreme Court's opinion in

Roe v. Wade, 410 U.S. [1]13 (1973) and its progency. The legality of a woman's right to an abortion within the first trimester has been definitely decided by the U.S. Supreme Court.

The U.S. Supreme Court has insisted that strict scrutinity be applied to laws regulating abortions. In this regard, the Court has recognized only two (2) compelling state interests justifying narrowly drawn regulations: (1) the interest in protecting the health of the woman, which becomes compelling at the end of the first trimester, and (2) the interest of protecting potential life, which becomes compelling at the point of viability. The states may still enact legislation affecting the first trimester, but only if, the regulation imposes no non de minim is burden on the woman's right to exercise her right to an abortion, and it is justified by an important state health objective.

While this Court understands Defendants' argument that they are attempting only to give the patients time to reflect and make a more informed decision, it is clear any such requirement imposed by governmental authority would be violative of the U.S. Constitution. *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983). Recently, the Illinois Parental Notice Abortion Act, which imposed a twenty-four (24) hour waiting period after an unemancipated minor notified both parents of her decision to have an abortion, was struck down as placing a direct and substantial burden on women and minors who seek to obtain abortions. *Zbaraz v. Hartigan,* 584 F. Supp. 1452 (D. C. III 1984), *aff'd in part, reformed and remanded* in part, F.2d (7th Cir. 1985 decided May 20, 1985).

Certainly, Defendants are in no better position than the state legislatures in imposing their views on patients coming to the clinic in the hopes that these women will make a more "informed" decision.

Defendants' arguments attacking the viability of *Roe v. Wade* must fail under the clear director of the present state of constitutional law. Likewise, Defendants claim, that all unborn children and women who will have an abortion are indispensable parties to this suit, is also unmeritorious.

V.

CONCLUSION

This opinion should not be construed as any indication of this author's personal views on the socio-constitutional issue of abortion. The Court's personal views, pro or con, have no place in the important task of determining and applying constitutional law. The Defendants, and all others interested in this issue, should continue to exercise their constitutional rights in the many and varied social and political arenas available. This Court merely holds that the Defendants' rights of free speech and assembly, as guaranteed by the Texas Constitution, do not extend to the parking lot of a privately owned office building at 6420 Hillcroft, Houston, Texas.

BASED ON THE FOREGOING, Plaintiff's request for Temporary Injunction is GRANTED.

SIGNED this 14th day of August, 1985.

/s/ Michael L. O'Brien

MICHAEL L. O'BRIEN, Judge
125th Judicial District Court

87-2002

Supreme Court, U.S.
FILED
JUL 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

In The

Supreme Court of the United States

October Term, 1988

RIGHT TO LIFE ADVOCATES, INC., ETC., ET AL.,
Petitioners,

VS.

AARON WOMEN'S CLINIC,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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(713) 655-0008

Attorney of Record for Respondent

QUESTIONS PRESENTED

1. Whether the requisite state action and jurisdiction exists sufficient to warrant the granting of the Petition for Writ of Certiorari.

2. Whether the State of Texas violated Federal due process requirements under the Fourteenth Amendment when it decided that Petitioners had no standing to raise an unmeritorious defense.

3. Whether Roe v. Wade should be overruled.

LIST OF ALL PARTIES

A. PETITIONERS:

1. RIGHT TO LIFE ADVOCATES, INC. "d/b/a ABORTION ABUSE ADVICE & INFORMATION SERVICE, ABORTION ABUSE & ADVISORY INFORMATION HOTLINE, and CRISIS PREGNANCY CENTER OF HOUSTON";

2. CRAIG K. ANDERSEN;

3. J. (JIM) BAILEY;

4. LEE P. HELMKE;

5. GARY LOTH;

6. BARBARA A. MARTONE;

7. JOHN A. MARTONE;

8. KATHY MATHEMS;

9. SHEILA MCINTOSH; and

10. JOSEPH J. PESL.

B. RESPONDENT:

1. AARON WOMEN'S CLINIC (which is an assumed name of ORIENT SALES CORPORATION, a corporation).

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ARGUMENT AND AUTHORITIES

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE, UNDER THE UNITED STATES CONSTITUTION, THIS DISPUTE BETWEEN PRIVATE PARTIES DOES NOT INVOLVE THE REQUISITE STATE ACTION.

It is well settled that the exercise of an individual's right of free speech and assembly on a privately owned shopping center, irrespective of its size or the character of the property, is not a protected activity under the First Amendment of the United States Constitution. Lloyd Corporation v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L.Ed.2d 131 (1972); Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L.Ed.2d 196 (1976); Right to Life Advocates, Inc. v. Arron Women's Clinic, Supplemental Memorandum of the Trial Court. This is so because the Federal Constitution prohibits governmental infringement of constitutional rights and it does not protect against conduct of purely private actors. The defendants make no pretense of satisfying the "state action" requirement necessary to invoke the protection of the Federal Constitution. See, e.g. State v. Schmid, 84 N.J. 535, 423 A.2d 615 (S. Ct. N.J. 1980, appeal dismissed sub nom.), Princeton University v. Schmid, 455 U.S. 100, 102 S. Ct. 867, 70 L.Ed.2d 855 (1982).

Petitioner's attempt to cure this jurisdictional defect by arguing that state action exists (the decision of the Texas Court of Appeals and Texas Supreme Court) and that such supports a violation of the United States Constitutional Amendment Fourteen is not well founded. The Texas Court of Appeals denied Petitioner's argument of unclean hands for the reason that 1) Petitioners did not show injury to them so as to be

entitled to raise the defense (all of the cases cited by Petitioners in support of their injury argument in fact involved parties that themselves had legal or proprietary interests in the subject matter of the dispute) and 2) Respondents were not guilty of unclean hands inasmuch as Roe v. Wade, 410 U.S. 113 (1973) established the legality of pregnancy terminations within the limitations set forth in Roe v. Wade. Petitioner's second point of error complaining of the decision of the Texas Supreme Court upholding the Court of Appeals is founded on the same argument. Such an argument presents no issue to this Court under the Federal Constitution.

Analogously, Petitioner's attempt to present to this Court another constitutional challenge to Roe v. Wade is not well founded. Such must be raised in the context of state action, referenced previously, and no party to this lawsuit, nor the actions of any party, constitute such state action as is required before a Petition for Writ of Certiorari to this Court would be well founded.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED OVER THE CONSTITUTIONAL ISSUES PRESENTED IN THIS APPEAL FOR THE REASON THAT SAME WERE NOT PRESERVED IN THE TRIAL COURT.

Petitioner's arguments made under the Fourteenth Amendment to the Texas Constitution and the numerous challenges to Roe v. Wade were not preserved in the Trial Court. (Tr 27, 41). According to Petitioner's Petition for Writ of Certiorari, Roe v. Wade is requested to be reconsidered on the basis of what is allegedly substantial social and policy grounds. This was not adequately presented to the Trial Court as the Statement of Facts and the Transcript constituting the

record transmitted to this Court will readily reveal. Petitioner's pleadings in the Trial Court did not plead, and Petitioner's evidence proffered in the Trial Court did not support, the arugments and challenges that Petitioners now seek to make in this Court to Roe v. Wade. Rather, Respondent's suit was challenged by defenses allegedly raised under the Fifth, Ninth and Tenth Amendement to the Federal Constitution. Though Petitioners have proposed to raise certain other constitutional issues in the Trial Court, such are issues not carried forward to the Petition for Writ of Certiorari. Having failed to raise such issues in their petition in the Trial Court (when Respondent would have had the opportunity to controvert same with evidence relating to such issues, which Respondent did not have the opportunity to do), Petitioners are precluded from raising those issues in this Court.

III.

THE TEXAS COURTS DID NOT VIOLATE THE DUE PROCESS CAUSE OF THE FOURTEENTH AMENDMENT IN THEIR DECISION SINCE PETITIONERS HAD NO STANDING TO RAISE THEIR DEFENSE OF UNCLEAN HANDS AND THEIR DEFENSE WAS UNMERITORIOUS (GERMANE TO PETITIONER'S POINTS OF ERROR I AND II)

Petitioner's argument must fail in the first analysis for the reason that Respondent's are not guilty of unclean hands. Roe v. Wade, 410 U.S. 113 (1973), within the standards set forth therein, established the legality of pregnacy terminations. This stands as the law of the land and any potentially contrary law (referenced in Petitioner's Points of Error III and IV) could not stand in the face of this Court's decision. Operating a legal business in a lawful manner cannot constitute unclean hands as a matter of law.

Additionally, as held by the Texas Court of Appeals, a party such as Petitioner asserting the equitable defense of unclean hands to injunctive relief (all arising under Texas State Law) must, as a matter of Texas State Law, show that such party, and not some third-party, was injured by the conduct of the party seeking the injunction (Respondents). Omohundro v. Matthews, 161 Tex. 367, 341 S.W.2d 401, 410 (1960). The Court of Appeals examined all cases cited by Petitioners and found that such cases did not deviate from the requirement of injury to the complaining party. Each of the cases cited by Petitioners in their Petition for a Writ of Certiorari to this Court, are distinguishable. In City of Wink v. Griffith Amusement Company, 129 Tex. 40, 100 S.W.2d 695 (1936) the Supreme Court ruled that the amusement company that sued the city to enjoin the city from enforcing the city's existing anti-lottery ordinance was not entitled to the injunction because its business violated the public policy and law of the State and thus the amusement company did not come into Court with clean hands. In Humphries-Mexia Company v. Arsneaux, 116 Tex. 603, 297 S.W. 225 (1927), the oil company and water company had colorable rights to the property in question and would have the requisite standing. In Riley v. Davidson, 196 S.W. 2d 557, 559-560 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.) the Court of Appeals held that one who could suffer a health injury could raise the defense of unclean hands against the party (the owner of the water supply line) committing acts in violation of the health law. In all of these cases, the parties before the Court had real interests in the controversy and were acting to protect their rights. Distinguished from this line of cases is the current situation where Petitioners are not suffering the harm, if any, by pregnancy termination. As against a challenge to Petitioner's inability to fullfill a Texas legal prerequisite to asserting a Texas defense to a Texas equitable remedy, Petitioners have not shown the requisite standing as would be required to sustain Petitioner's position.

IV.

ROE V. WADE SHOULD NOT BE OVERRULED (GERMANE TO PETITIONER'S POINTS OF ERROR III AND IV)

It should be inititally noted that Petitioner's strain to confer jurisdiction on this Court to overrule Roe v. Wade within the context of Petitioner's unclean hands defense (referenced in I, surpa) Given that such arguments fail, the underlying rationale for presenting another challenge to Roe v. Wade in this Court must also fail. In the absence of Petitioner's standing, as described above, Petitioners do not present a valid jurisdictional or procedural challenge to Roe v. Wade in their Petition for a Writ of Certiorari.

Additionally, Roe v. Wade has been examined and re-examined on numerous occasions by this Court. The same reasons as caused this Court to decide Roe v. Wade initially stand as arguments as to why Roe v. Wade should not be overruled. Roe v. Wade having withstood numerous constitutional challenges since its decision, and Petitioner's arguments primarily re-presenting many of these arguments, this Petition for a Writ of Certiorari presents no new constitutional arguments that should be reviewed.

As to the additional reasons referenced in Petitioner's Petition for a Writ of Certiorari, such are not supported by evidence in this record, were not raised in the Trial Court and in fact (when considered and reviewed), do not provide sufficient grounds for overruling Roe v. Wade (as against the numerous considerations weighing in favor of the initial Roe v. Wade decision and its support since the decision).

CONCLUSION

For the reasons and authorities stated, it is submitted respectfully that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed certified, return receipt requested to Mr. Thomas C. Sanders, 5874 San Felipe, #1250, Houston, Texas 77057 and Mr. Richard W. Schmude, P. 0. Box 674, Tomball, Texas 77375 on this 1 day of July, 1988.

JOHN W. BERKEL

Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2002

In The

Supreme Court of the United States

October Term, 1987

—o—

RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL,

Petitioners,

vs.

AARON WOMEN'S CLINIC,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

—o—

REPLY BRIEF

—o—

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LIST OF ALL PARTIES

A. *PETITIONERS*:

1. RIGHT TO LIFE ADVOCATES, INC. "d/b/a ABORTION ABUSE ADVICE & INFORMATION SERVICE, ABORTION ABUSE & ADVISORY INFORMATION HOTLINE, and CRISIS PREGNANCY CENTER OF HOUSTON";[1]
2. CRAIG K. ANDERSEN;
3. J. (JIM) BAILEY;
4. LEE P. HELMKE;
5. GARY LOTH;
6. BARBARA A. MARTONE;
7. JOHN A. MARTONE;
8. KATHY MATHEMS;
9. SHEILA MCINTOSH; and
10. JOSEPH J. PESL.

B. *RESPONDENT*:

1. AARON WOMEN'S CLINIC (which is an assumed name of ORIENT SALES CORPORATION, a corporation).

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1 Petitioner Right To Life Advocates, Inc. is a Texas nonprofit membership corporation without capital stock or stockholders. It is not owned directly or indirectly by any other corporation nor does it own directly or indirectly any other corporation. Hence, it does not have any parent or subsidiary corporation, nor is it affiliated by ownership with any other corporation.

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REPLY ARGUMENT

I.

THE PETITION IS SOUND JURISDICTIONALLY

Respondent claims (Response, pp. 1-2) that the Petition should be denied because of a jurisdictional defect, namely, that it does not present the required state action for 14th Amendment (Due Process Clause) purposes. The constitutional and jurisdictional challenges to *Roe v. Wade,* 410 U.S. 113 (1973), however, do not require "state action." They involve a decision of this Court and are before the Court properly. As shown on pp. 2-5, below, *Roe* was challenged collaterally in the Trial Court, and, while most of the arguments on pp. 11-19 of the Petition were not made there they were advanced before the Court of Appeals and Supreme Court of Texas.

While state action is important to Petitioners' challenge to appellate rulings under the Due Process Clause of the 14th Amendment to the U.S. Constitution, the Petition shows clearly that such state action was present (Petition, pp. 7-11). The initial decision of the Court of Appeals operated to deprive Appellants of their rights to defend themselves under the defense of unclean hands under Texas law; the deprivation was compounded when, on rehearing, Justice Bill Cannon withdrew his approval of the "majority opinion" and concurred in result only, thereby depriving Petitioners' of such rights when a majority of the panel did not so rule; and the Supreme Court of Texas abused its discretion manifestly with its denial of Petitioners' application for a Writ of Error. There should be no question but that the complained of actions of such courts constitute "state action" under the Due Process Clause of said 14th Amendment. See *Shelly v. Kraemer,*

334 U.S. 1, 14-18 (1948) (ruling by a state court as state action under the Equal Protection Clause of said 14th Amendment).

II.

THE CHALLENGES TO ROE V. WADE ARE BEFORE THIS COURT PROPERLY

1. Among other defenses, all Petitioners pleaded or adopted the following before the Trial Court (Tr. 43-44; see Tr. 55):

IX.

EQUITABLE DEFENSE—UNCLEAN HANDS DUE TO THE VIOLATION OF CERTAIN TEXAS CRIMINAL LAW

Plaintiff is not entitled to injunctive or other relief because Plaintiff has entered this Court, seeking equitable and other relief, with unclean hands. Plaintiff is engaged in the wholesale killing of Unborn Children in violation of the Texas anti-abortion law revived as a legal effect of *Roe v. Wade*, 410 U.S. 113 (1973), such law being the English statutory and/or common law adopted as law in the Republic of Texas and carried forward into Texas law by the 1845 Annexation Accord between the United States and the Republic of Texas. Such law was in place in Texas in 1854 at the time Texas enacted the anti-abortion laws which the Supreme Court declared to be unconstitutional in *Roe*. Such law is of supremacy clause stature under Article VI of the U.S. Constitution because it was carried forward into Texas law by said 1845 Accord which, in turn, is of treaty status under said Article VI. Such law was revived, under the doctrine of revival, as a legal effect of *Roe*.

X.

EQUITABLE DEFENSE—UNCLEAN HANDS DUE TO THE VIOLATION OF CERTAIN TEXAS ANTI-ABORTION LAW

Plaintiff is not entitled to injunctive or other relief because it has unclean hands because it has car-

ried on and continues to carry on abortion activities in violation of the Texas anti-abortion laws which the U.S. Supreme Court purported to hold unconstitutional in *Roe v. Wade,* above. *Roe,* however, is void as violative of the due process clause of the Fifth Amendment to the U.S. Constitution, the Ninth Amendment to the U.S. Constitution, the division of powers concept as guaranteed by the Tenth Amendment to the U.S. Constitution and certain federal statutory law and Article VI (supremacy clause) of the U.S. Constitution. Further, *Roe* is void as violative of fundamental principles of personal jurisdiction since neither Abortion "Survivors" who die because of abortion nor Unborn Children affected by abortion were before or represented before the 3-Judge District Court or the U.S. Supreme Court in *Roe* by guardian or next friend, or by counsel for such guardian or next friend.

At the hearing on temporary injunction, Counsel for five Petitioners (Right to Life Advocates, Inc., Helmke, Loth, McIntosh and Pesl) argued the unclean hands defense under Section IX, above (S.F. 482-485); and, in relation to the unclean hands defense in Section X, above, said, in part, that *Roe* was "void for a number of reasons, and I'm going to mention just the chief reasons" (S.F. 485). While the Trial Court was not receptive (S.F. 485-488), Counsel argued that the "children were not represented"; that "[b]abies born alive after abortion die because of abortion" and "[t]hey are United States citizens" and "were not represented"; that there was "no personal jurisdiction over them or the unborn"; and that "[t]he Court manufactured the right to kill by abortion" (S.F. 488). The Trial Court said, "I may agree with everything you say, but there is absolutely no way I could set aside Roe v. Wade" (S.F. 488). Counsel replied (S.F. 488-489):

> One thing, Judge: On the face of the—on the face of the decision, on the face of the judgment, there is no representation and no personal jurisdiction, and just following Supreme Court precedent, the thing is void, so we want to preserve that argument, and, if this case does go up, this will be urged all the way up.

The Trial Court ruled against the defense of unclean hands in its Memorandum of Opinion but, in so doing, did not address the unclean hands defense in Section IX, above, i.e., violation of revived Texas anti-abortion law of U.S. Constitutional stature ("revival contention") (Pet. App. 36-39).

2. At the trial on the permanent injunction, the Trial Court said, in part, that it had ruled by written memorandum, and that it was "not prepared at this time to change its opinion of the case" (S.F. 517). Thereafter, Counsel for such five Petitioners made various arguments, including the revival contention (S.F. 522-525).

After such argument, the Court said, in part (S.F. 526):

> There were several arguments that were made that were dealt with in an umbrella fashion. Some were not stated and overruled specifically, but obviously implicit in all the arguments, much like this last argument, is that *Roe v. Wade* effectively forecloses your argument that abortion is murder within the first trimester * * *.

The Court said that it had rendered its opinion, and that it was going "to leave it in the hands of those in the Appellate Courts * * *" (S.F. 541).

3. Respondent claims that "Petitioners' arguments made under the Fourteenth Amendment to the Texas Constitution (sic) and the numerous challenges to *Roe v. Wade*

were not preserved in the Trial Court. (Tr. 27, 41)" (Response, p. 2).[2] While it is true that most of such grounds were not advanced in the Trial Court, this does not mean that Petitioners are precluded from advancing the same before this Court since the revival contention and the claim that *Roe* was void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction were raised in the Trial Court. It was not essential that all constitutional and jurisdictional *arguments* against *Roe* be asserted in the Trial Court where, as here, the constitutional and jurisdictional positions against Roe, through an application of the unclean hands defense, was taken and preserved there. On appeal, Petitioners advanced—without objection or complaint by Respondent—the various challenges (originating in an application of the defense of unclean hands) on pp. 11-19 of the Petition. Such challenges were unsuccessful before the Court of Appeals and the Supreme Court of Texas and are before this Court properly.

Except for the revival contention (Petition, pp. 21-23), the additional reasons Petitioners advanced for overruling *Roe,* as set forth on pp. 19-29 of the Petition, were not raised in the Texas Courts. That does not, however, fore-

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2 The record references cited do not support the contention. While the original answer of five Petitioners (Andersen, Bailey, Mathems and the two Martones) was a general denial (Tr. 27), their first amended original answer incorporated by reference all defenses filed in the original answer of the five remaining Petitioners (Tr. 55; see Tr. 41-45). There were two defense attorneys, each representing five different defendants.

close this Court from considering them because the Texas Courts were hardly proper fora for their consideration and resolution. *Roe* is of this Court's making. Since the Texas Courts were powerless to overrule *Roe,* the policy, social and other considerations set forth therein for such overrule were plainly for this Court. They are ancillary to the revival contention and the constitutional and jurisdictional challenges and are before this Court properly.

In any event, this Court's responsibility as final arbiter of the Constitution hardly can be circumscribed by the arguments or failures at argument by private litigants before it. Suffice it to say, the *issue* of the constitutionality and lawfulness of *Roe* is before the Court properly; and the Court has the constitutional authority to address the merits of that issue fully. See footnote 3, *infra,* where the United States, in an *amicus curiae* brief, requested the Court to reconsider and overrule *Roe* in a context where, unlike the instant case, the question of overrule was not presented apparently in the lower courts.

III.

THE TEXAS COURTS VIOLATED DUE PROCESS WHEN THEY DENIED PETITIONERS' DEFENSES OF UNCLEAN HANDS AS POSTURED UNDER EXISTING TEXAS LAW

Next, Respondent contends that Petitioners' (due process) argument must fail because (1) Respondent is not guilty of unclean hands since "[o]perating a legal business in a lawful manner cannot constitute unclean hands as a matter of law" (Response, p. 3), and (2) Petitioners lacked standing to sustain the defense of unclean hands since, under Texas law, they were not injured by Respondent's activities (Response, p. 4). The contention is without merit.

1. As for standing, it is clear—under Texas law—that one who is engaged in unlawful conduct or business is not entitled to equitable relief in order to preserve or aid the same. *City of Wink v. Griffith Amusement Co.*, 100 S.W. 2d 695, 702 (S.C. Tex., 1936); *Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225, 229-230 (S.C. Tex., 1927); *Riley v. Davidson*, 196 S.W. 2d 557, 559, 560 (Tex. Civ. App.—Galveston, 1946), writ ref. n.r.e. In addition, there is no requirement that the one who raises the defense of unclean hands in such a context be injured by such conduct or business *Ibid.* Yet noninjury was the reason put forth by the Trial Court and the initial decision of the Court of Appeals to deny Petitioners' rights under such defense.

Petitioners' rights in such regard were clear and the Court of Appeals deprived them of liberty and property without due process of law, in violation of the 14th Amendment to the U.S. Constitution, when it denied the defense to them. While the Court's ruling in that regard was contained in its initial decision (2:1), it lacked majority approval after rehearing—when Mr. Justice Cannon withdrew his approval of the "majority opinion" and concurred in the result only (Pet. App., 23-24).

Respondent argues (Response, p. 4) that the parties in the above cases "had real interests in the controversy and were acting to protect their rights" whereas the Petitioners "are not suffering the harm, if any, by pregnancy terminations." Nonsufferance of abortion harm, however, is *not* the test of interest in *this* controversy. Petitioners have substantial interests in the premises: They are entitled (1) to exercise, peacefully and reasonably, their liberties of speech and press under Article I, Section

8, of the Texas Constitution in the context of this lawsuit; (2) to offer literature, counsel and assistance to women about to enter the building in question so that such women might exercise *their* speech and press rights under Article I, Section 8, of the Texas Constitution, by receiving/exchanging information, etc. with Petitioners; and (3) to defend their liberties and their properties under applicable law against Respondent's lawsuit concerning injunctive relief.

2. On the merits, Respondent is guilty of unclean hands under Texas law because its abortion business is unlawful. First, such business violates the Texas anti-abortion law which this Court purported to hold unconstitutional in 1973 in *Roe v. Wade.* Such law is still in effect because Roe is void as violative of the U.S. Constitution and of fundamental principles of personal jurisdiction (Petition, pp. 11-19).

Second, if it is assumed that *Roe* is a lawful and constitutional decision, such business would violate Texas anti-abortion law which was revived as law in Texas as a legal consequence of *Roe,* and such law is of supremacy status under Article VI of the U.S. Constitution as between the United States and Texas because it was carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord between the United States and the Republic of Texas (Petition, pp. 21-23).

Finally, and apart from the above, that aspect of Respondent's business involving the aborting of unmarried minors without lawful parental or other consent violates the consent provisions of the *Texas Family Code,* §§ 35.01 and 35.03(a)(4).

IV.

ROE V. WADE SHOULD BE OVERRULED

Finally, in shotgun fashion, Respondent contends (Response, p. 5) that *Roe v. Wade* should not be overruled because (1) the Petitioners have not presented a valid or procedural challenge thereto due to their lack of standing, (2) the reasons which caused the Court to decide *Roe* stand as arguments against its overrule, (3) *Roe* has withstood "numerous constitutional challenges", Petitioners' arguments re-present primarily many of these arguments and the Petition "presents no new constitutional arguments that should be reviewed", and (4) the additional reasons referenced in the Petition for overruling *Roe,* i.e., unintended consequences (including revival contentions) and factual or other errors (Petition, pp. 19-29), were not supported by the evidence in the record, were not raised in the Trial Court and, when considered and reviewed, do not provide sufficient grounds for overruling *Roe.*

Reasons "(1)" and "(4)", above, were addressed on pp. 5-6, 6-9 of this Reply Brief and need not be repeated here. Suffice it to say they are wholly without merit since the Court does have jurisdiction to entertain an overruling of *Roe* and, in so doing, may give due consideration to the additional reasons advanced on pp. 19-29 of the Petition. Such reasons are addressable properly by this Court which, of course, is the only tribunal in the United States with authority to overrule *Roe.*

As for reasons "(2)" and "(3)", above, the short answer is that, to Petitioners' knowledge, the Court has not entertained and resolved constitutional or jurisdictional challenges to *Roe* brought by parties in cases where

review was granted or otherwise taken by the Court.[3] Accordingly, the constitutional and jurisdictional challenges to *Roe* presented by the Petitioners, which have *not* been disposed of *on the merits* previously by the Court, are appropriate and ripe for consideration.

To be sure, the Court, in 1983, reaffirmed *Roe* on grounds of *stare decisis*. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-420 (1983). But *stare decisis* is a weak basis for the upholding of a decision which purports to interpret the U.S. Constitution. That document, of course, constitutes supreme law in this Nation, and the Court should be receptive to re-examination of its interpretive work in light of claimed error or other appropriate reason. Vested Error has *no place* in the constitutional life of this Nation or the Rule of Law.

The Petition sets forth numerous bases for the overruling of *Roe* which need not be repeated here. Suffice it to say, they are substantial and are before the Court properly.

Respectfully submitted,

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3 In 1985, the United States, in an *amicus curiae* brief, urged the Court to reconsider and overrule *Roe*. See Brief for the United States as Amicus Curiae in Support of Appellants in Nos. 84-495 and 84-1379, *Thornburgh v. American College of Obstetricians and Gynecologists* and *Diamond v. Charles*, pp. 20-24.